Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

JUSTIN MANNING JACOBS,
PETITIONER

v.

H. ROGER LAWLER,
CLARK & KORDA, a partnership,
JOHN W. CLARK, MARY E. ARAND,
ROPERS, MAJESKI, KOHN & BENTLEY,
a Professional Corporation,
ROBERT S. LUFT, W. BYRON LEVY and
CHARLES G. RIGG,
RESPONDENTS

On Petition For Review
To The Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

JUSTIN MANNING JACOBS.
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In Propria Persona

QUESTION PRESENTED

Whether the California anti-SLAPP statute, CCP § 425.16, violates the Fourteenth Amendment to the United States Constitution.

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Petition for a writ of Certiorari

Justin Manning Jacobs respectfully petitions for a Writ of Certiorari to review the final ruling of the California Supreme Court in this case.

Opinions Below

The denial of Petition for Review by the California Supreme Court (2004) (App. 1). The opinion of the California Court of Appeal, Sixth Appellate District (2004) (App. 2-21).

Jurisdiction

The California Supreme Court denied Petitioner's Petition for Review on July 14, 2004. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides in pertinent part that, "Congress shall make no law . . . abridging the freedom of speech . . . or to petition the Government for a redress of grievances." The Fourteenth Amendment to the United States Constitution, Section 1, provides in pertinent part that,

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The pertinent provisions of the California Constitution, Article I, Sections 2, 3, 7 and 16, are reprinted in Appendix F to this petition. App. 34. The pertinent provisions of the California anti-SLAPP statute, California Code of Civil Procedure section 425.16 (hereinafter "CCP § 425.16"), are reprinted in Appendix G to this petition. App. 35-37.

Statement of the Case

This case involves the California anti-SLAPP statute, CCP § 425.16, which is one of twenty-three similar state laws throughout the United States. This anti-SLAPP statute, and its extraordinary motion to strike a plaintiff's complaint, violates the Fourteenth Amendment to the United States Constitution, *inter alia*, because it is overly broad, void for vagueness, and it abridges, burdens, denies and deprives liberty and property rights without due process or equal protection of law; and because it abridges the First Amendment freedoms and privileges of United States citizens to petition and of free speech, which it was enacted to protect.

The three Justice minority of the California Supreme Court has repeatedly criticized the anti-SLAPP statute, as interpreted by the four Justice majority, *inter alia*, for being ambiguous, being overly broad, chilling protected petitioning rights, not being narrowly tailored, violating due process, not being balanced, and burdening protected First Amendment rights. The minority has even concluded: "The cure has become the disease – SLAPP motions are now just the latest form of abusive litigation." *Navellier* v. *Sletten*, 29 Cal.4th 82, 96 (2002)

In June 1989, Petitioner purchased 91 acres of land from Respondent Lawler in Woodside, California, intending to divide it into 16 rural lots. Lawler

received $6 million in cash and a purchase money deed of trust for the $3 million balance, which he subordinated to Petitioner's $6.2 million bank loan. Two years later the project failed, mainly because of Lawler's frauds and breaches of contract. The bank foreclosed. Lawler then sued Petitioner for a $3 million purchase money deficiency judgment, which was prohibited by California statute CCP § 580(b). Lawler also alleged false promise fraud because Petitioner refused to pay such deficiency. Petitioner counter sued for fraud damages and breach of contract. During the lawsuit, Lawler was represented by the other Respondents, who are all attorneys. After a 1996 jury trial, Lawler was awarded a judgment for $6.7 million. Petitioner appealed and was forced into Chapter 11 bankruptcy in order to protect his remaining assets from Lawler's threatened execution. In 2000, the California Court of Appeal reversed the judgment for Lawler as a matter of law in *Lawler* v. *Jacobs*, 83 Cal.App.4th 723 (2000).

In January 2002, Petitioner sued Lawler and the Respondent attorneys with a verified complaint, alleging that Lawler's former lawsuit was a malicious prosecution and millions of dollars in damages. Petitioner also demanded a jury trial. Before answer, the Respondents filed two separate motions to strike Petitioner's complaint pursuant to the anti-SLAPP statute, CCP §§ 425.16(b). Petitioner responded with sworn affidavits, documentary evidence, and legal briefs which, *inter alia*, set forth the Fourteenth Amendment constitutional issues and defenses described in this Petition. Respondents countered with legal briefs, affidavits by their legal counsel concerning documentary evidence, but with only two short affidavits of percipient facts by Respondents Arand and Clark which were limited to the issues of their malice and their probable cause. None of the other Respondents filed sworn affidavits of percipient facts in

support of their motions to strike.

Petitioner also filed a motion, pursuant to CCP §§ 425.16(g), for limited discovery of facts within the possession and sole knowledge of Respondents and a critical witness, which facts Petitioner demonstrated were necessary to help substantiate *prima facie* Petitioner's verified allegations of lack of probable cause, malice, fraud on the court, perjury and subornation of perjury by the Respondents. Petitioner's Motion for Limited Discovery and Motion for Reconsideration were denied on the ground of failure to show good cause. App. 24-26. Respondents' motions to strike were then granted on the ground that Petitioner had failed to substantiate a probability of success at a jury trial, and his complaint was stricken. App. 22-23. Petitioner was then required to pay Respondents $124,895.63 for their costs and attorney fees pursuant to CCP §§ 425.16(c). App. 27-33. Respondents now claim $226,113.66 more for their costs and attorney fees during appeal.

Petitioner timely appealed and again set forth the Fourteenth Amendment constitutional issues and defenses described in this Petition. Petitioner's appeal was denied and the trial court's Order to Strike Petitioner's complaint was affirmed by the Court of Appeal (App. 2-21) on April 20, 2004. However, the opinion of the Court of Appeal did not discuss nor rule on such constitutional issues. Petitioner timely filed a Petition for Review with the California Supreme Court, again setting forth such constitutional issues and defenses in detail. App. 38-81. Petitioner's Petition for Review was summarily denied on July 14, 2004 by the California Supreme Court. App. 1. Having exhausted his remedies at the state level, Petitioner now petitions the United States Supreme Court to review and decide such important constitutional issues which are abridging and depriving the protected rights and

freedoms of Petitioner, the citizens of California, and the citizens of many other states across our nation.

Reasons for Granting the Writ

I. The California anti-SLAPP statute abridges, chills, burdens, deprives and punishes protected petitioning rights.

The societal interest behind the statute, and Petitioner's constitutional rights.

In 1992, the California Legislature enacted an anti-SLAPP statute,[1] CCP § 425.16. The preamble paragraph, CCP §§ 425.16(a), describes "the specific intent and purpose behind the remedial legislation." *Briggs* v. *Eden*, 19 Cal.4th 1106, 1127 (1999):

> The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.[2]

The minority dissent in *Briggs*, 19 Cal.4th at 1126, described the general nature of a SLAPP suit. They, ". . . 'masquerade as ordinary lawsuits' . . . they are generally meritless suits brought by large private interests to deter common citizens from exercising

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[1] "SLAPP" means "strategic lawsuit against public participation"

[2] The last sentence was added in 1997.

their political or legal rights . . . winning is not a SLAPP plaintiff's primary motivation. . ." They are deemed to be an "abuse of the judicial process." *Id.*, at 1127. Thus the distinguishing feature of a SLAPP suit is that it is not *genuine* protected petitioning. Rather it is non-protected *sham* petitioning brought primarily to deter political opponents from exercising their protected petitioning rights.

Genuine petitioning is protected against abridgment by the First Amendment; sham petitioning is not. *BE&K Construction* v. *NLRB,* 536 U.S. 516 (2002) The right of access to the courts is an aspect of the First Amendment right to petition. *McDonald* v. *Smith,* 472 U.S. 479, 482-484 (1985). The First Amendment right and privilege to genuinely petition is also protected against state action abridgment and deprivation by the Fourteenth Amendment. *Columbia* v. *Omni,* 499 U.S. 365 (1991). The constitutional right to petition generally grants one who files a lawsuit immunity from liability for doing so, unless the litigation is a sham. *Prof. R. E. Investors* v. *Columbia Pictures,* 508 U.S. 49, 60-62 (1993) Likewise, a party's selfish motives are irrelevant to the right to petition (*Columbia,* 499 U.S. at 380), unless they are illegal or unconstitutional. It has long been recognized that a malicious prosecution is non-protected 'sham' petitioning, because it is objectively meritless and is subjectively initiated for an illegal purpose. *Prof. R. E. Investors,* 508 U.S. at 62-63.

Regardless of the purposes described in its preamble, the California anti-SLAPP statute, as enacted, interpreted and applied, abridges and deprives Petitioner's and many others' Fourteenth Amendment rights of liberty, property, due process and equal protection of the laws, as well as the liberty rights and privileges of free speech and to petition guaranteed by the First Amendment. Due process

"expresses the requirement of "fundamental fairness."" *Lassiter* v. *Department*, 452 U.S. 18, 24-25 (1981). 'Equal Protection' expresses the requirement that persons similarly situated shall not arbitrarily or irrationally be treated differently by the state. *Gulf* v. *Ellis*, 165 U.S. 150 (1897). The anti-SLAPP statute also abridges and deprives Petitioner's and others' fundamental due process liberty and property guarantees of free speech and to petition contained in the California Constitution, Article I., Sections 2 and 3 (App. 34); and his fundamental due process guarantee of the "inviolate right" to a trial by jury contained in the California Constitution, Article I, Section 16. App. 34. The right of a potential litigant to the use of judicial procedures is protected against deprivation of property without due process of law. *Logan* v. *Zimmerman*, 455 U.S. 422, 428-429 (1982)

The anti-SLAPP statute, as interpreted, is overly broad and void for vagueness.

CCP §§ 425.16(b)(1) authorizes a special motion to strike the petitioner's complaint:

> A cause of action against a person *arising from* any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. (emphasis added.)

CCP §§ 425.16(e) describes four factual situations, only one of which the complaint must *arise from* as a pre-requisite to defendant's motion to strike:

> As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

The majority characterized all four of such factual situations as "statutorily protected activity." *Navellier*, 29 Cal.4th at 95. The statute abridges protected petitioning and deprives liberty and property without due process of law, because its reach and restrictions are so ambiguously and vaguely worded that, "men of common intelligence must necessarily guess at its meaning." *Broderick* v. *Oklahoma*, 413 U.S. 601, 607 (1973). For example, what is an "issue of public interest"? It also abridges protected petitioning and is a deprivation of liberty and property without due process because it is overly broad and reaches and abridges First Amendment freedoms. *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

Instead of narrowly tailoring the statute to reach only the specific societal vice perceived, SLAPP's, the California Legislature and Supreme Court have chosen

to enact, construe and apply it as broadly as possible. The dissenting minority of three California Supreme Court Justices acknowledged in *Navellier*, 29 Cal.4th at 96: "The specific SLAPP problem warrants a specific remedy. . ." But they concluded that, "the majority opts for an all-inclusive definition of SLAPP's, which . . . treats identical cases differently . . . and may chill the right of petitioning the law was designed to protect . . . The majority appears willing to consider any suit a SLAPP, based largely on when it was filed. . ." The minority pointed out that this "unrestricted application of the law . . . will actually chill petitioning activity that is constitutionally protected." *Id.*, at 101. The minority also concluded that: "The cure has become the disease – SLAPP motions are now just the latest form of abusive litigation." *Id.*, at 96.

In addition, the dissent in *Navellier* referred to the "layers of uncertainty" presented by the anti-SLAPP laws which confront plaintiffs with "novel claims." 29 Cal.4th at 102. Likewise, the dissent in *Briggs*, 19 Cal.4th at 1128, 1129, characterized the majority's construction as "overly broad," "expansive," and "ambiguous;" and concluded that the statute's "drastic pretrial remedy" (*Id.* at 1126) was not intended to be "generally available to the parties to any civil action." *Id.* at 1124 "The majority's holding in this case belies [the] carefully delineated legislative purpose and will authorize use of the extraordinary anti-SLAPP remedy in a great number of cases to which it was never intended to apply." *Id.*

As a further example of the majority's overly broad construction, Justice Baxter's dissent in *Briggs*, 19 Cal.4th at 1135-36, referred to the Legislature's 1997 amendment to the preamble, CCP §§ 425.16(a): "To this end, this section shall be construed broadly." He concluded: "Obviously, the opening phrase . . . – "To this end . . ." – reflects the Legislature's intent that the

remedial provisions of the anti-SLAPP legislation be "broadly construed" within the context of the restricted scope of the statement of legislative purpose contained in subdivision (a)." *Id.* However, the majority in *Briggs* construed this sentence as if the words, "To this end," were not even there. *Id.*, at 1119 They also construed the remainder of the anti-SLAPP statute as if the entire preamble of purposes and limitations had been completely omitted. *Id.*, at p.1111-1113.

The majority also interpreted CCP § 425.16 "to protect . . . all statements" equally, regardless of their societal worth or degree of constitutional protection. *Briggs*, 19 Cal.4th at 1119. Thus, even false statements and fighting words could trigger a motion to strike. They justified this broad standard on its "bright-line test," the "Legislative intent," and "judicial efficiency," and they hoped it would not "unduly jeopardize meritorious lawsuits." (*Id.*, at 1121-1122)

Likewise, the majority in *Navellier* stated that for the motion to strike to apply, the defendant need only demonstrate that, "plaintiffs' action is one arising from the *type of speech and petitioning activity that is protected by the anti-SLAPP statute.*" 29 Cal.4th at 95 (emphasis added) This "statutorily protected petitioning" (*Id.*) need not "'meet the lofty standard of pertaining to the heart of self-government" (*Id.* at 91), nor need it be "constitutionally protected under the First Amendment" (*Id.* at 95), nor need it even be a "valid exercise" of constitutional speech and petitioning rights. (*Id.* at 94.) In effect the anti-SLAPP statute, as construed, authorizes four broad, new, and bizarre state created categories of "statutorily protected" petitioning activity that not only compete and conflict with the First Amendment petitioning and free speech freedoms, but can actually contradict and trump them as well. For example, any petitioner validly exercising his or her protected First Amendment right to petition

by filing a complaint in court, is now subject to the burdens and penalties inflicted by the statute's *drastic* motion to strike if the lawsuit "arose from" any such "statutorily protected activity," even if such activity is an unprotected or invalid exercise of First Amendment rights. (*Id.* at 94, 95.) Has not the First Amendment, as interpreted by the Supreme Court of the United States, preempted the fields of free speech and the right to petition? This intrusive state action is a blatant and serious abridgment of our cherished First Amendment freedoms.

What limitations do the anti-SLAPP laws impose? As a prerequisite to the motion to strike, it must only be demonstrated that "defendant's conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e), . ." *Equilon* v. *Consumer Cause* 29 Cal.4th 53, 66 (2002). The majority describes this as the *most important* of the "[substantive and procedural] limitations that protect plaintiffs." (*Id.* at 65) Another limitation claimed for the anti-SLAPP statute is that plaintiff's complaint cannot be stricken if plaintiff pleads and substantiates a probability that the lawsuit will succeed at trial. But this, of course, is not a threshold limitation on the exercise of defendant's drastic and burdensome motion to strike to which plaintiff must respond. It merely means that plaintiff's complaint is not officially defined as a SLAPP action until plaintiff's complaint is stricken. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89) However, there is no requirement that defendant's conduct was actually petitioning protected by the First Amendment. Nor is there any limitation that defendant's statement or conduct actually involves a 'public issue' pertaining to self-government. As rationalized by the majority: "Any matter pending before an official proceeding possesses some measure of "public significance" . . ." *Briggs*, 19 Cal.4th at 1117-1118. ". . . it is the context or setting

itself that makes the issue a public issue . . ." *Id.* at 1116. Such activity has "public significance per se" (*Id.*, at 1122), and can trigger a motion to strike. Conversely, if defendant's act or statement *is* made in connection with an issue of public interest then it may be made in any "place open to the public" (CCP §§ 425.16(e)(3)), or anywhere (CCP §§ 425.16(e)(4)); and it can also trigger a *drastic* motion to strike. Thus, CCP § 425.16 can apply to any lawsuit, including small claims court (*Briggs*, 19 Cal.4th at 1110, 1115), arising from any such act or statement by defendant . . . no matter how remote, irrelevant, immaterial, or inconsequential the statement, the official proceeding, the connection, the consideration, the public place, the issue, the public interest or the public significance. What do any of these ambiguous concepts mean?

The California Supreme Court case of *Jarrow* v. *LaMarche*, 31 Cal.4th 728 (2003), holds that *all* cases alleging a malicious prosecution are presumptively SLAPP's merely because they arose out of the defendant's prior petitioning and lawsuit. *Id.* at 734-735. Just because, by definition, all "malicious prosecution causes of action fall within the purview of the anti-SLAPP statute" (*Id.*, at 735), all petitioning plaintiffs must therefore first prove to the court a probability that they will prevail, before they may proceed. This was the Court's ruling, even though a prior malicious and meritless lawsuit is unprotected sham petitioning, and even though this common law remedial action has long been recognized as valid and not an abuse of judicial process. *Crowley* v. *Katleman* 8 Cal.4th 666 (1994). Similarly, Petitioner's case, which alleged a malicious prosecution by Respondents, was presumptively ruled to be a SLAPP, even though it involved only a garden variety non-political dispute between individuals; even though it was Petitioner's only remedy for the Respondents' prior abuse of the judicial process; even though it involved no matters of

public or political interest; even though the Respondents' rights were not chilled because they had fully enjoyed their prior petitioning rights before a jury; and even though Petitioner's complaint was genuine petitioning on its face, because Petitioner had fought in court for over a decade to defend against Lawler's invalid actions, and to win and recover Petitioner's substantial damages for Lawler's frauds and breaches of contract. The resulting burdens placed on Petitioner and the striking of his complaint pursuant to CCP § 425.16 were both prior restraints of Petitioner's protected freedom to petition.

Petitioner's case and *Jarrow* demonstrate the validity of the dissent's predictions in *Navellier*: "[the] all inclusive definition of SLAPP's, . . [will] chill the right of petitioning the law was designed to protect" (29 Cal.4th at 96); and "the majority's holding helps unmeritorious parties . . . who file first and harms meritorious parties . . . who file second." *Id.* at 104. Petitioner's case also demonstrates that the statute's overly broad definition of presumptive SLAPPs contained in CCP §§ 425.16(e) does not directly *advance* the state's legitimate interests or the statute's objectives, especially with respect to Petitioner's case. *Metromedia* v. *San Diego*, 453 U.S. 490 (1981).

This was only one example of the statute's overly broad reach and application. CCP § 425.16 could be arbitrarily applied to almost any breach of contract action, *i.e.* where the defendant's verbal breach was somehow made in connection with some issue before a distant court, any defamation or slander of title case, any fraud case, any eviction case, any verbal assault case, any claim of title, any act interpreted as verbal conduct, any cross-complaint, even a traffic accident on the way to a political rally . . . the list is potentially endless. The dissent in *Briggs*, 19 Cal.4th at 1129, described the "enormity of legal actions" which would

"automatically qualify" as a presumptive SLAPP suit. For example: "Any litigation arising from any word uttered in . . . any "official" proceeding in California, . . [or in] every pleading or piece of paper prepared in connection with any legal proceeding . . . if actionable . . ." *Id.* None of the prospective plaintiffs in any such actions, like Petitioner, would have any *objective standard* when they contemplated filing their actions, as to whether they would face the burdens and penalties of a motion to strike, and the resulting arbitrary denial of their protected constitutional rights. (*Winters* v. *New York*, 333 U.S. 507 (1948); *Herndon* v. *Lowry* , 301 U.S. 242 (1937))

The statute requires a plaintiff to rebut, with admissible evidence before discovery, a presumption that plaintiff's complaint is a frivolous *sham*

Normally the party seeking to benefit from a statute bears the burden of making a *prima facie* showing that the statute (*vis.* the motion to strike) should apply to the case. *Zhao* v. *Wong*, 48 Cal.App.4th 1114, 1133 (1996) The dissent in *Briggs* points out that this is what would have been required if the four categories of "statutorily protected petitioning" had not been added in CCP §§ 425.16(e). *Briggs*, 19 Cal.4th at 1134. But with CCP § 425.16, as construed, there is no requirement or limitation that the defendant first prove that the statute actually applies, *vis.* that petitioner's lawsuit was "brought primarily to chill the exercise of [defendant's] constitutional rights . . ." *City of Cotati* v. *Cashman*, 29 Cal.4th 69, 74 (2002). As stated by the majority in *Navellier*, 29 Cal.4th at 88:

> [A] defendant that satisfies its initial burden of demonstrating the targeted action is one arising from protected activity faces no additional requirement of proving the

> plaintiff's *subjective* intent. Nor need a moving defendant demonstrate that the action actually has had a chilling effect on the exercise of such rights. (emphasis added)

Instead, the court in *Equilon*, 29 Cal.4th at 61, stated that if the lawsuit arose from any of the four factual situations set forth in CCP §§ 425.16(e), then: "[T]he court may [effectively] *presume* the purpose of the action was to chill the defendant's exercise of First Amendment rights. It is then up to the plaintiff to rebut the *presumption* by showing a reasonable probability of success on the merits." (emphasis added.) The above strained and overly broad presumption was justified by the majority because it provides an "objective test" and conserves "judicial resources." *Equilon*, 29 Cal.4th at 65. However, the presumption not only results in a screening of unprotected sham and meritless petitioning, but constitutionally protected genuine non-frivolous and meritorious petitioning as well. As the dissent concluded in *Navellier*, 29 Cal.4th at 96: "[The majority's] presumptive application of section 425.16 will burden parties with meritorious claims and chill parties with nonfrivolous ones." "Plaintiffs now have the burden of proving the viability of their claims, without benefit of discovery." *Id.*, at 101. Once a complaint is presumed to be a SLAPP, there is nothing the plaintiff can do to avoid a motion to strike; not amendment (*Roberts* v. *Bar Association*, 105 Cal.App.4th 604 (2003)), not voluntary dismissal (*eCash* v. *Guagliardo*, 127 F.Supp.2d 1069 (2000)), not even resolution. *Moraga* v. *Weir*, 115 Cal.App.4th 477 (2004). This presumption shifts the burden of proof (rebuttal) to the petitioning plaintiff: to prove to a court with admissible evidence before discovery (and even before answer), that petitioner's complaint should not be stricken, because petitioner's lawsuit has a probability of success at trial. At the outset, the petitioner is

mandated the difficult and costly burden of demonstrating that his or her right to petition is not a frivolous sham or an abuse of the judicial process, but rather is being genuinely exercised and probably should win. In effect, the petitioner is preemptively required to prove to the court his or her fundamental 'right' of access to the courthouse, as if it were a conditional privilege.

For example, the Petitioner in the case at bar has already spent almost three years, well over $400,000 dollars and many more than a thousand hours of his own time attempting to get his complaint past the gatekeepers to the courthouse, so that his grievances might be heard by a jury of his peers. Despite being denied necessary discovery, he has proved *prima facie* by numerous sworn statements, admissible evidence and legal briefs the required probability of success of his action at a jury trial. The defendants have not even answered, and most of them have submitted no sworn or admissible evidence even attempting to counter Petitioner's substantial evidentiary showing. Petitioner's complaint has now been stricken on the ground that he has not substantiated a probability of prevailing at trial. App. 22-23. In Petitioner's situation, all of these burdens have been tantamount to a *prior restraint* of his right to petition.

The minority in *Navellier* concluded that the "presumptive application of section 425.16" (29 Cal.4th at 101) "encourages [an inappropriate] "race to the courthouse" to enjoy the benefit of favorable procedural rules." *Id.*, at 100. "A party benefits merely by filing first." *Id.*, at 101. "[T]he majority's holding helps unmeritorious parties . . . who file first and harms meritorious parties . . . who file second." *Id.* at 104. This state process of granting favorable procedural rules to the party who petitions first, and inflicting burdens and penalties on the party who petitions

second, is not fundamentally fair. It also denies equal protection of the laws, because Lawler, who won the race to the courthouse, was arbitrarily allowed to petition and have his day in court before a jury, whereas Petitioner who lost the race and petitioned second was irrationally not permitted to petition or have his day in court before a jury. This arbitrary state classification and arbitrary discrimination based on the sequence of petitioning of parties similarly situated, is not fairly and rationally related to advancing a legitimate objective of the state, nor of the statute. *Reed* v. *Reed*, 404 U.S. 71, 75-76 (1971).

The statute's denial of necessary discovery abridges petitioning and deprives property without due process or equal protection.

"The constitutional right of access to the courts may be compromised if a litigant is deprived of the opportunity to discover the facts necessary to prove his or her case." *Zhao*, 48 Cal.App.4th at 1129. CCP §§ 425.16(g) states that:

> All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted . . .

"In order to satisfy due process the burden placed on the plaintiff must be compatible with the early state at which the motion is brought and heard . . . and the limited opportunity to conduct discovery. . ." *Wilcox v Superior Court*, 27 Cal.App.4th 809, 823. The federal rule condoning summary judgments against a plaintiff assumes, *inter alia*, that "the plaintiff has had a full

opportunity to conduct discovery." *Anderson* v. *Liberty*, 477 U.S. 242, 257 (1986). But under the anti-SLAPP statute the plaintiff is not entitled to full discovery, and must show good cause for even specified limited discovery, which the court may or *may not* grant. CCP §§ 425.16(g) The court in *Lafayette* v. *Chronicle*, 37 Cal.App.4th 855, 868 (1995), stated: "If the plaintiff [shows] . . . in response to the motion to strike, that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case, the plaintiff *must* be given the reasonable opportunity to obtain that evidence through discovery before the motion to strike is adjudicated . . ." (emphasis added) If this occurs, then due process is not violated. *Id.*

However, in the case at bar, Petitioner demonstrated to the court that he needed to discover evidence of the malice, lack of probable cause, fraud, perjury and subornation of perjury elements of his malicious prosecution action. Petitioner showed that such evidence was within the possession or exclusive knowledge of the defendants or a witness. Petitioner timely moved and showed good cause for specified limited discovery, but Petitioner's motions for discovery were summarily denied. App. 24-26. The trial court then ruled that Petitioner had not substantiated the probability of prevailing at trial, and his complaint was stricken. App. 22-23. Petitioner's appeal was then denied. App. 2-21.

By denying Petitioner the judicial procedure of necessary discovery before ruling on the motion to strike his complaint, California has abridged his freedom to petition and deprived the Petitioner of property without due process of law. *Logan*, 455 U.S. at 428-429. This state action does not comport with the fundamental fairness guaranteed by the Fourteenth Amendment. *Id.* It would be harsh justice, an abridgment of protected petitioning, and a severe

violation of due process and fundamental fairness if a court was permitted to strike a petitioner's complaint for failing to demonstrate necessary facts which the petitioner was prohibited by the same court from discovering. Such arbitrary burdening and irrational unequal treatment of Petitioner and plaintiffs generally, is also a denial of equal protection of the law for the reasons set forth in the previous section.

The statute deprives the fundamental liberty right to a jury trial in California without due process or equal protection.

The California Constitution, Article 1, Section 16, provides in pertinent part: "Trial by jury is an inviolate right and shall be secured to all..." Thus, the common law liberty right to a trial by jury in civil law cases is a fundamental liberty right in California which is protected by the Fourteenth Amendment against deprivation by state action without due process. It is also a judicial procedure which is protected against deprivation of property without due process of law. *Logan*, 455 U.S. at 428-429. One of the major purposes "of a jury is to guard against the exercise of arbitrary power – to make available the common sense judgment of the community . . . in preference to the professional or perhaps over-conditional or bias response of a judge..." *Taylor* v. *Lawson,* 419 U.S. 522, 530 (1975) Inherent in the right to a trial by jury is that "all questions of fact are to be decided by the jury." California Evidence Code §§ 312(a) It is also the providence of the jury to weigh the opposing evidence and "to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants." California Evidence Code §§ 312(b). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . ." *Anderson*, 477 U.S. at 255.

After the defendant files an anti-SLAPP motion to strike plaintiff's complaint, the court must determine whether "the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." CCP §§ 425.16(b)(1) "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." CCP §§ 425.16(b)(2).

In 1994, the New Hampshire Supreme Court reviewed the constitutionality of a proposed New Hampshire anti-SLAPP bill "modeled after the California statute." (*Opinion*, 138 N.H. 445, 449 (1994)) The court stated that, unlike the procedure for determining a motion for summary judgment, ". . . wherein the court does not resolve the merits of a disputed factual claim, the procedure in the proposed bill requires the trial court to do exactly that." *Id.* at 451. The Court concluded that the proposed bill violated New Hampshire's constitutional right to a jury trial, and stated: "A solution cannot strengthen the constitutional rights of one group of citizens by infringing upon the rights of another group." *Id.* Also, the federal rule condoning summary judgments against a plaintiff assumes that no disputed material issues of fact remain. *Anderson* , 477 U.S. at 247-249. The California statute which authorizes summary judgments, states likewise. CCP § 437c. However, with the anti-SLAPP laws many material issues of fact may not only remain for a jury to decide, but as here where the defendants have not even answered, the issues have not yet even been formulated.

The California Supreme Court has acknowledged the deprivation of the right to a jury trial which would result if CCP § 425.16 required "the plaintiff first to prove the specified claim to the trial court." *Briggs*, 19 Cal.4th at 1123. So the courts require the plaintiff to have "substantiated a legally sufficient claim" (*Id.*),

with a "sufficient prima facie showing of facts" (*Wilson* v. *Parker*, 28 Cal.4th 811, 821 (2002)), "that would be admissible at trial." *Kashian* v. *Harriman*, 98 Cal.App.4th 892, 906 (2002) "[T]hough the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." *Wilson*, 28 Cal.4th at 821. But, this is not a *prima facie* test. It is a court trial by affidavit.

These standards of 'sufficient substantiation of admissible facts' and 'which party's evidence *defeats* the other,' require the trial court to distinguish between facts, speculations, conclusions, and lies, and to recognize inadmissible hearsay, all without cross-examination; also to determine the effect, value and credibility of each fact, and what legitimate inferences to draw from them, all without cross-examination. The court must then weigh the competing hearsay evidence to determine which hearsay evidence *defeats* the other. These are all functions of a jury. *Anderson*, 477 U.S. at 255. The substantial features of a jury trial, of cross-examination and other vital judicial procedures, are thus denied to plaintiff without due process. *Logan*, 455 U.S. at 428-429.

Despite lip service to the contrary, the anti-SLAPP statute *de facto* mandates a court trial with proof based solely on pleadings, affidavits and hearsay. The statute *does* "require the plaintiff to first *prove* the specified claim to the trial court" as a condition to exercising the "inviolate" due process right to a trial by jury in California. When plaintiff's proof fails in the eyes of the court to defeat the defendant's proof, plaintiff's complaint is stricken, and the right to a jury trial is denied completely. *Opinion*, 138 N.H. at 451. This is a substantial deprivation of liberty and

property without due process and fundamental fairness. This arbitrary discrimination is also a denial of equal protection for the reasons previously set forth, and because the arbitrary denial of a jury trial to the class of litigants, plaintiffs or persons who lose the race to the courthouse, is not fairly, substantially, and rationally related to advancing a legitimate objective of the state, or of the statute. *Reed*, 404 U.S. at 75-76.

Petitioners are unreasonably burdened, chilled and penalized by arbitrary anti-SLAPP costs and attorneys fees.

If for any reason the plaintiff loses the opposition to defendant's motion to strike, CCP §§ 425.16(c) provides that the plaintiff must pay all of defendant's costs and attorney fees at trial and on appeal: "In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." For example, Petition was required to pay a total of $124,895.63 to Respondents for their costs and attorney fees at the trial court level. Respondents have now moved for an additional total of $226,113.66 for their costs and attorney fees in opposing Petitioner's appeal. That is a grand total of $351,009.29, over a third of a million dollars in costs and attorney fees which Respondents have claimed that they are automatically entitled to under CCP §§ 425.16(c), before they have even answered, and before Petitioner has been allowed to ask a single question in discovery. One can only imagine how much more Respondents might automatically be entitled to under CCP §§ 425.16(c), because of Petitioner's current exercise of his First Amendment freedoms? On the other hand, CCP §§ 425.16(c) provides: "If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing

on the motion, pursuant to Section 128.5."

This arbitrary and unequal entitlement of fees and costs to the defendant similarly situated, has been described as a "penalty", to punish plaintiffs who file SLAPP complaints. But the plaintiff's failure to successfully oppose defendant's motion does not mean that the complaint was a SLAPP or frivolous. It could mean that plaintiff's genuine petitioning was just not meritorious enough under current law; that plaintiff was denied discovery of necessary facts (as was the case with Petitioner), or that the judge drew inferences which a jury would not. It could mean anything. Thus, this penalty abridges protected petitioning because it is not rationally related to directly advancing a legitimate objective of the statute. *Metromedia* v. *San Diego*, 453 U.S. at 490.

Regardless of the reason, the prospect of the petitioner having to pay costs and attorney fees as a penalty for petitioning will have a chilling effect on protected petitioning activity. As the dissent concluded in *Navellier*, 29 Cal.4th at 102: "Many parties, especially those with limited resources, will hesitate to file under these conditions. . . This result will reduce petitioning and thus contradict the law's purpose."

Even if plaintiff defeats the motion to strike and the defendant's inevitable appeal under CCP § 425.16(j), this process "imposes costs and burdens for which these plaintiffs will never be made whole." *Navellier*, 29 Cal.4th at 102. All plaintiffs will lose months or years of valuable time, effort and delay in seeking redress (*Id.*, at 101), in addition to physical and mental stress, and adverse economic consequences. All plaintiffs must also pay their own costs and attorney fees in opposing such motion. To recoup any of such costs and fees, the prevailing plaintiff must prove to the court that defendant's "motion to strike is

frivolous or is solely intended to cause unnecessary delay" (CCP §§ 425.16(c)), an almost impossible burden of proof. Thus, no matter if the plaintiff wins or loses on the motion, his or her protected petitioning activity is unreasonably burdened, chilled, abridged and punished. It is also a deprivation of property without due process or fundamental fairness.

Unlike fee shifting based equally upon which party prevails, the above unequal and arbitrary discrimination against a class of litigants similarly situated, *vis.* plaintiffs or parties who lose the race to the courthouse, is not rationally related to advancing a legitimate interest of the state, nor of the statute. *Reed*, 404 U.S. at 75-76. It arbitrarily punishes plaintiffs, and arbitrarily rewards defendants similarly situated. *Gulf*, 165 U.S. at 153. Thus, it is also a denial of plaintiff's right to "equal protection of the laws". *Id.*; *Cleburne* v. *Cleburne*, 473 U.S. 432 (1985).

II. The burdens inflicted by the anti-SLAPP laws are not constitutionally justified.

The anti-SLAPP laws are not narrowly tailored to avoid abridging freedoms.

CCP § 425.16, as construed, violates the due process clause of the Fourteenth Amendment, because it reaches, restricts and burdens protected free speech and petitioning as well as the specific SLAPP vice perceived. *Brandenburg*, 395 U.S. 444. As stated by Justice White in *Broadrick*, 413 U.S. at 612: "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes."

The majority's criteria of 'litigation arising from a statutorily protected activity,' which is designed to trigger the drastic motion to strike process, is so overly broad and vague that it is difficult to imagine an action or case to which it could not apply. As stated by the minority in *Briggs*: "It would be an exercise in futility to attempt to quantify all possible examples of lawsuits based on actionable oral statements or writings which, under the majority's construction . . . will automatically qualify as retaliatory SLAPP suits as a matter of law." 19 Cal.4th at 1128-1129. This overly broad application and its related abridging burdens, do not just advance the statute's stated societal interests. Instead, they also result in chilling the petitioning activity they were intended to protect, and in "sweeping new categories of litigation, bearing no resemblance to the abusive litigation practices described in [CCP § 425.16(a)]." *Id.*, at 1136.

Some California cases attempted to limit the statute to purposes delineated in the preamble CCP §§ 425.16(a), *vis.* where the lawsuit arose from a "public issue" relevant to self-government (*Zhao*, 48 Cal.App.4th at 1128-1129, 1131-1132), or at least to activities which involved a "public interest." *Linsco* v. *Investors*, 50 Cal.App.4th 1633, 1638-1639 (1996) But the majority of the California Supreme Court overruled these attempts at narrowing and instead elected for the broadest possible reach. *Briggs*, 19 Cal.4th at 1114, 1116, 1120.

Unlike the *Noerr-Pennington* line of federal cases, California has not narrowly defined the perceived vice, a SLAPP case, in terms of the plaintiff's illegal subjective motivation of "intent to chill" protected rights, in order to advance its societal interest without infringing upon the protected rights of others. Instead, the California Supreme Court specifically denied such a requirement and stated: "Fortunately, the question

of subjective intent is not relevant." *City of Cotati*, 29 Cal.4th at 74. Their rationale was that any such requirement would be "too restrictive" and "would compromise the Legislature's deliberately expansive remedial design." *Id.* at 75-76.

If California had narrowly defined a SLAPP case as '*sham*' petitioning, both objectively and subjectively, like that described in *BE&K Construction*, 536 U.S. at 525-526, and had it required the defendant to first prove *prima facie* that his or her petitioning was constitutionally protected and that the complaint was not protected genuine petitioning, then many of the above abridgements and deprivations could have been avoided. Indeed, the three Justice minority of the California Supreme Court appears to have already reached this conclusion. They advocate that the trial court "engage in the 'subtle inquiry' necessary to distinguish proper petitioning from suppressive SLAPP's." *Navellier*, 29 Cal.4th at 96. ". . . the mere fact that an action was filed after protected activity [petitioning] took place does not mean it arose from that activity." *Id.* at 98. ". . . the disparate standards applied to parties based on when they arrive at the courthouse make a mockery of the legitimate statutory purpose of protecting litigants from coercive practices." *Id.*, at 102. The dissent continued, *Id.*, at 103-104:

> Distinguishing SLAPP's from legitimate petitioning is challenging but essential. Our proper solicitude for one party's right to petition cannot come at the expense of the other party's parallel right. "[T]he right to seek judicial relief for redress of grievances [is] too fundamental in character to permit petitioning activity to be turned against the petitioning party in the absence of a showing that the petitioning activity had lost its constitutionally privileged status..." (Citation)

The societal interests relating to the anti-SLAPP laws are not balanced.

The anti-SLAPP statute and the opinions of the majority are drafted as if the "statutorily protected petitioning" which they were attempting to protect, overrides and trumps all other protected freedoms. Their main concerns appear to be: a) whether the obstacles constructed to litigation petitioning are 'efficient' and 'effective' in eliminating all imaginable SLAPP's; b) whether these obstacles strictly mirror the Legislature's literal intent; and c) whether they inform potential plaintiff's about what awaits them when they file complaints. But the anti-SLAPP situation, like the *Noerr-Pennington* line of cases, involves two opposing petitioners each personifying different but similar societal interests to be weighed and balanced. As stated in *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968), "the problem is to arrive at a balance between the interests . . ."

One way to define and determine balancing, is to state and demonstrate what it should *not* be. To paraphrase the Supreme Court of New Hampshire, balancing should not "strengthen the constitutional rights of one group of citizens by infringing upon the rights of another group." *Opinion*, 138 N.H. at 451. By defining a SLAPP suit over broadly, defendants are strengthened against SLAPP plaintiffs, but only, "at the expense of the other party's parallel right." *Navellier* dissent, 29 Cal.4th at 103-104. The same is true with shifting the burden of proof, with the denial of discovery, with the denial of a jury trial, and with the arbitrary cost and attorney fee rules. They all strengthen defendants against SLAPP plaintiffs, but the protected rights of countless genuine petitioners are also abridged and chilled in the process. These societal interests are very out of balance in California.

Another way to approach balancing is to weigh one societal interest against the other. With the anti-SLAPP laws, the defendant has already exercised defendant's protected right to petition and is now attempting to defend against the plaintiff by restraining the plaintiff from exercising his or her protected right to petition. As stated by Justice O'Connor in *BE&K Construction*, 536 U.S. at 530:

> By analogy to other areas of First Amendment law, one might assume that any concerns related to the right to petition must be greater when enjoining ongoing litigation than when penalizing completed litigation. After all, the First Amendment historically provides *greater protection from prior restraints* than after-the-fact penalties [citations], and enjoining a lawsuit could be characterized as a *prior restraint*, whereas declaring a completed lawsuit unlawful could be characterized as an after-the-fact penalty on petitioning. (emphasis added)

Thus, in the anti-SLAPP context, when weighing the societal interests relative to the plaintiff who is beginning a lawsuit against the after-the-fact societal interest relative to the defendant who has completed a lawsuit, constitutional law should require that the societal interests relative to the plaintiff, avoiding a prior restraint, should receive the greater protection. Lesser protection of the defendant who has completed petitioning, should require the moving defendant to accept the burden of proving that plaintiff's petitioning is a *sham*. On the other hand, requiring the plaintiff to shoulder a similar difficult burden of proof is tantamount to a *prior restraint* of plaintiff's First Amendment rights, without any clear and present danger or other compelling reason to justify it.

A third way to balance the competing societal interests, is to come to a reasonable compromise. The fact that petitioning of the courts is a constitutional freedom implies that it is also presumed to be genuine. If either litigant claims that the other is not genuinely petitioning, the claimant should have the burden of proving such claim and rebutting the presumption of genuineness. But the test of genuineness should not turn on frivolous facts such as those contained in CCP §§ 425.16(e) or the sequence of the petitions, which is essentially the case with CCP § 425.16. If a complaint is frivolous, it is objectively a sham and can be summarily dismissed by existing remedies, such as a demurrer. Or, if the defendant demonstrates that the evidence does not leave a disputed material issue of fact for a jury, and as a matter of law that the plaintiff cannot prevail on such evidence, then a summary judgment is appropriate.

On the other hand, if a complaint is objectively not frivolous but has some legal merit, it is objectively not a sham and should be constitutionally protected regardless of the litigant's selfish motives; unless such motives are illegal or unconstitutional. The burden should then be on the defendant to demonstrate *prima facie* with admissible evidence that the complaint was filed with an unconstitutional motive: *i.e.*, primarily to chill the defendant's valid exercise of constitutional rights of freedom of speech or to petition. In other words, that the complaint is subjectively and presumptively a sham, and is not constitutionally protected. If this showing occurs, only then should the burden of proof shift to the plaintiff to rebut such a *prima facie* presumption or the complaint will be stricken.

III

CONCLUSION

The constitutional issues and abuses described in this petition are not limited to California. *Briggs*, 19 Cal.4th 1127. Twenty-two other states have anti-SLAPP laws, and many are modeled after California's anti-SLAPP laws. Still other states have anti-SLAPP bills pending or are considering adopting California's anti-SLAPP laws. There is no clear, consistent or constitutionally justified definition of a SLAPP action. Over sixteen states shift the burden of proof from the moving defendant to the plaintiff, and many states stay plaintiff's discovery. Over twenty states entitle prevailing defendants to recover costs and attorney fees; but only a few allow a prevailing plaintiff to recover them, and then only if the plaintiff proves that the motion to strike was an abuse of judicial process.

Petitioner raised all of these constitutional issues at trial and during appeal, but they were not even considered or discussed by the courts. The plaintiff in *Bernardo* v. *Planned Parenthood*, 115 Cal.App.4th 322 (2004), also asserted such constitutional issues and abuses, but they were rejected by the California courts. Under the guise of protecting First Amendment freedoms, the anti-SLAPP statute, as interpreted, is instead progressively eroding them. The many serious concerns voiced by the minority of California Supreme Court have not been heard. Petitioner now respectfully requests that the highest court in the land consider and rule on these constitutional issues of national concern.

Respectfully submitted,
Justin Manning Jacobs

APPENDIX A

Court of Appeal,
Sixth Appellate District - No. H024924

SUPREME COURT
FILED
JUL 14 2004
Frederick K. Ohlrich Clerk
DEPUTY

S125227

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JUSTIN M. JACOBS,
Plaintiff and Appellant
v.
H. ROGER LAWLER, et al.,
Defendants and Respondents

Application for stay and petition for review DENIED.

"s/*GEORGE*".
Chief Justice

APPENDIX B

Filed 4/20/04 Jacobs v. Lawler CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

JUSTIN M. JACOBS, JR., Plaintiff and Appellant, v. H. ROGER LAWLER et al., Defendants and Respondents.	H024924 (Santa Clara County Super. Ct. No. CV804380)

Plaintiff Justin M. Jacobs, Jr. (Jacobs) sued defendants H. Roger Lawler (Lawler), Clark & Korda Partnership, John W. Clark, and Mary E. Arand (Clark & Korda), and Ropers, Majeski, Kohn & Bentley Corporation, Robert S. Luft, W. Byron Levy, and Charles G. Rigg (Ropers) for malicious prosecution. In the underlying action, Lawler (represented initially by Clark & Korda and finally by Ropers) had successfully sued Jacobs for breach of contract and fraud but the judgment was reversed on appeal. (Lawler v. Jacobs (2000) 83 Cal.App.4th 723.) In this action, Lawler, Clark & Korda, and Ropers filed special motions to

strike under Code of Civil Procedure section 425.16,[1] commonly known as the anti-SLAPP statute. The trial court granted the motions and dismissed the action. Jacobs appeals. We affirm the judgment.

LEGAL BACKGROUND

Section 425.16, subdivision (b)(1), provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

"The purpose of the statute is to encourage participation in matters of public significance by allowing a court to promptly dismiss unmeritorious actions or claims that are brought to chill another's valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. [Citation.] In furtherance of this purpose, the anti-SLAPP statute is to be construed broadly." (*Padres L.P. v. Henderson* (2003) 114 Cal.App.4th 495, 508.)

"On a special motion to strike under the anti-SLAPP statute, '[t]he moving party bears the initial burden of establishing a prima facie showing the plaintiff's cause of action arises from the defendant's

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[1] Further unspecified statutory references are to the Code of Civil Procedure.

free speech or petition activity.' [Citations.] The moving SLAPP defendant may meet this burden by showing the act which forms the basis for the plaintiff's cause of action was an act that falls within one of the four categories of conduct described in subdivision (e) of section 425.16 . . . . [¶] [3] 'If the defendant establishes a prima facie case, then the burden shifts to the plaintiff to establish 'a probability that the plaintiff will prevail on the claim,'" i.e., "make a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiff's favor." [Citation.]' " (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1417.)

"In reviewing an anti-SLAPP motion, a court must consider the pleadings and the evidence submitted by the parties (§ 425.16, subd. (b)(2)); however, it cannot weigh the evidence, but instead must simply determine whether the respective party's evidence is sufficient to meet its burden of proof. [Citation.] On appeal, we independently review [page 3] the trial court's ruling on the motion to strike." (*Padres L.P. v. Henderson, supra*, 114 Cal.App.4th at p. 509.)

It can no longer be disputed whether a malicious prosecution lawsuit falls within the scope of the anti-SLAPP statutory framework. The Supreme Court recently held in *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735, that because a lawsuit is a "petition to the judicial branch" and by definition, "a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit," malicious prosecution actions fall within the purview

of the anti-SLAPP statute.[2] Therefore the issues on this appeal arise from the second prong of the statute, dealing with whether the plaintiff has "demonstrated a probability of prevailing on the claim." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.)

"To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the underlying action was (1) commenced by or at the direction of the defendant and pursued to a legal termination in the plaintiff's favor; (2) brought without probable cause; and (3) initiated with malice." (*Padres L.P. v. Henderson, supra*, 114 Cal.App.4th at p. 513.)

A malicious prosecution plaintiff need not establish that the defendant asserted each and every cause of action without probable cause and with malice, but need only establish that the defendant asserted one of the grounds for liability without probable cause and with malice. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 679.)

Though the parties extensively debate the sufficiency of Jacobs's showing on all three elements, we limit our focus to the probable-cause element (as the trial court did) since the failure to establish any one element is dispositive.

Probable cause is a low threshold designed to protect a litigant's right to assert arguable legal claims

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[2] Jacobs disagrees with *Jarrow*. We are bound to follow *Jarrow*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

even if the claims are extremely unlikely to succeed. (*Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at p. 742.) "*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, states the controlling test for determining whether a claim is supported by probable cause. The question is whether, as an objective matter, 'any reasonable attorney would have thought the claim tenable.' [Citation.] The answer depends upon the state of the law as well as the state of the facts. [Citations.] Thus the question is whether the claim was 'objectively tenable' [citation] or 'objectively reasonable' [citation], or that the attorney had 'a reasonable belief in the possibility of his suit being successful' [citation], in light of all relevant circumstances, including the factual circumstances peculiar to the specific case and the existing state of the law." (*Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 594.) Stated otherwise, an attorney "will lack probable cause for his action if he relies upon facts which he has no reasonable cause to believe to be true, or seeks recovery upon a legal theory which is untenable under the facts known to him." (*Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 568.)

"Reasonable lawyers can differ, some seeing as meritless suits which others believe have merit, and some seeing as totally and completely without merit suits which others see as only marginally meritless. Suits which all reasonable lawyers agree totally lack merit-that is, those which lack probable cause – are the least meritorious of all meritless suits. Only this subgroup of meritless suits present[s] no probable cause." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382.)

BACKGROUND

We decline to repeat the detail set forth in *Lawler v. Jacobs, supra,* 83 Cal.App.4th 723. It is sufficient to note the following simplified, undisputed facts.

Jacobs agreed to buy 91 acres of land from Lawler for $9 million. He closed the transaction by giving Lawler $6 million and a promissory note for $3 million. He secured the note by giving Lawler a deed of trust on the property. Lawler subordinated the deed of trust to a deed of trust that Jacobs gave a lender to secure an $8.2 million line of credit. The line of credit was for subdividing the property. At Lawler's insistence, Jacobs agreed that Lawler would have full recourse against Jacobs for payment of the note without the restriction of the anti-deficiency laws, which generally bar a seller from obtaining a deficiency judgment for the unpaid purchase price secured by a trust deed on the property purchased. (See § 580b.) Jacobs failed to subdivide the property. He defaulted on the line-of-credit note and Lawler's note. The line-of-credit lender foreclosed with a $6 million credit bid. Lawler then became a sold-out junior lienholder. Jacobs failed to pay Lawler the balance due on the note. Lawler then sued Jacobs for breach of contract and fraud.

Jacobs moved for summary judgment on the ground that the anti-deficiency laws barred Lawler's suit. Lawler countered that the *Spangler* exception to the anti-deficiency laws applied.[3] The trial court

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[3] In *Spangler v. Memel* (1972) 7 Cal.3d 603, "our Supreme Court fleshed out a narrow exception to the scope of section 580b–that of the nonstandard transaction. There, the

denied the motion. Jacobs renewed the issue at trial. The trial court ruled that the *Spangler* exception applied and entered a deficiency judgment against Jacobs. The jury then returned a $3 million fraud verdict against Jacobs on the basis of allegations that Jacobs never intended to (1) honor his promise to remain personally liable on the promissory note, and (2) forego asserting the anti-deficiency statutes as a defense to any enforcement action. The trial court later denied Jacobs's post-trial motions, which reiterated his positions, and entered judgment against Jacobs for $6.7 million. Jacobs appealed.

While the appeal was pending, the Supreme Court decided *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659, which clarified and refined the notion of when a subordination agreement places a transaction outside the intended scope of the anti-deficiency laws. There, the buyers had waived anti-deficiency protection in connection with a restructuring of their

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vendor sold a single-family residence for $90,000–$26,100 cash down with a $63,900 note secured by a purchase money deed of trust. The vendor agreed to subordinate the trust deed to future construction loans of up to $2 million for purposes of constructing an office building on the property. In return, the buyers agreed to waive their protection from deficiency judgments and personally guarantee the note. The office building was built, but the project was a commercial failure. The construction lender foreclosed, extinguishing the vendor's subordinated security. The vendor then sued for the deficiency. [¶] Affirming a judgment for the vendor, our Supreme Court first announced a two-part inquiry: (1) is the sale a sufficient variation on the standard purchase money situation so as to remove it from automatic application of 580b; and (2) if so, would the purposes of section 580b be served by invoking the statute's protections?" (*Lawler v. Jacobs, supra*, 83 Cal.App.4th at pp. 732-733.)

loan following defaults on obligations secured by first and second trust deeds. The seller then agreed to subordinate its deed of trust to any modification of the bank loan. The buyers defaulted again and the bank foreclosed, thereby extinguishing the seller's junior security. The seller then sued on the note. Rejecting the seller's waiver arguments, the court instructed: "*Spangler*'s rule is limited to those situations in which a pronounced intensification of the property's anticipated post-sale use both requires and eventually results in construction financing that dwarfs the property's value at the time of sale. Furthermore, the purchaser must be in a much better position than the vendor to assess the property's possible value and to understand the risks involved in capitalizing on the property's potential. Finally, under all the circumstances of the sale, including the property's development and the financing for that development, conferring section 580b's protection must unfairly thrust 'the risk of the failure of the commercial development . . . upon the vendor' [citation], imposing on it a commercially unreasonable burden . . . . In a situation in which all three factors are found, stability in secured land transactions is deemed to be better maintained by creating an exception to section 580b's safe harbor." (*Id.* at p. 666.) Distinguishing *Spangler*, the court further pointed out that the buyers did not obtain a large construction loan in furtherance of an intensified use. Indeed, the buyers continued with the same use. Additionally, the court emphasized the limited nature of the *Spangler* exception, cautioning that the mere presence of a subordination agreement does not automatically defeat application of section 580b.

In Jacobs's appeal, the court found that none of the *DeBerard* touchstones was present in the case and concluded that the Lawler-Jacobs transaction was a standard one subject to the anti-deficiency laws. It therefore reversed the judgment against Jacobs. Thereafter, Jacobs moved for prevailing-party litigation attorney fees for which the note provided. The trial court found that neither party had prevailed and denied the motion.[4] Jacobs appealed, and the court affirmed the order. Jacobs then filed this action.

DISCUSSION

"California courts have held that victory at trial, though reversed on appeal, conclusively establishes probable cause. (*Cowles v. Carter* (1981) 115 Cal.App.3d 350, 355-359 [conclusive presumption of probable cause where plaintiff wins on merits after fair adversary hearing, though win later reversed on appeal]; *Crowley v. Katleman*, [*supra*,] 8 Cal.4th [at p.] 692, fn. 15 [citing 'rule that an interim adverse judgment on the merits, even though subsequently set aside on motion or on appeal, conclusively establishes probable cause for the prior action'].) The rationale is that approval by the trier of fact, after a full adversary hearing, sufficiently demonstrates that an action was legally tenable. (*Cowles* [*v. Carter*,] *supra*, [115 Cal.App.3d] at p. 358.) To put it differently, success at trial shows that the suit was not among the least

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[4] The trial court reasoned that (1) the lawsuit came about because Jacobs breached the contract, (2) the jury had found for Lawler on Jacobs's fraud cross-complaint, which sought substantially more than did Lawler, and (3) a vast majority of the trial was consumed litigating Jacobs's cross-complaint.

meritorious of meritless suits, those which are totally meritless and thus lack probable cause. [¶] Denial of a defendant's summary judgment motion provides similarly persuasive evidence that a suit does not totally lack merit." (*Roberts v. Sentry Life Insurance, supra*, 76 Cal.App.4th at p. 383.)

Here, we have both types of victories in the underlying action. Lawler prevailed for probable cause purposes when (1) the law and motion judge denied Jacobs's motion for summary judgment, and (2) the trial judge and jury found for Lawler.

Jacobs seeks to avoid application of the interim-adverse-judgment rule by raising the fraud or perjury exception to the rule: (*Roberts v. Sentry Life Insurance, supra*, 76 Cal.App.4th at p. 384 ["[I]f denial of summary judgment was induced by materially false facts submitted in opposition, equating denial with probable cause might be wrong. Summary judgment might have been granted but for the false evidence. (For that matter, a jury verdict also might be induced by materially false testimony, raising a good argument that no conclusive presumption of probable cause should arise")].) He relies on a laundry list of evidence from the record of the underlying action that seemingly contradicts Lawler's testimony therein on the justifiable-reliance element of Lawler's fraud causes of action.[5]

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[5] Jacobs advances a minor point that the court in Lawler v. Jacobs, supra, 83 Cal.App.4th 723, held that it was unreasonable as a matter of law for Lawler to rely on Jacobs's illegal waiver of the anti-deficiency laws. But, taken in context, the court's remark does not establish a lack of probable cause for

Lawler testified that (1) he relied on Jacobs's promise to remain personally liable on the promissory note and waive the anti-deficiency laws, and (2) would not have sold the property had he known that the promise and waiver were unenforceable.

According to Jacobs, this testimony was perjurous principally because (1) Lawler gave deposition testimony indicating that he consulted his own attorney about the anti-deficiency waiver and received advice before agreeing to the transaction, (2) Lawler's attorney gave deposition testimony indicating that he

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the fraud causes of action. In making the remark, the court was separately analyzing whether Lawler's fraud causes of action survived the reversal of the contract cause of action or were dependent upon the validity of the contract cause of action. It was simply pointing out, after the fact of reversing the contract cause of action, that Jacobs's waiver of the anti-deficiency laws had to be illegal because the Spangler exception did not apply to the transaction. Had the court held that the Spangler exception applied to the transaction, Jacobs's waiver of the anti-deficiency laws would not have been illegal. (See Lawler v. Jacobs, supra, 83 Cal.App.4th at p. 738 ["Lawler's fraud action was for nonperformance of an invalid waiver of [section] 580b. Seeking recovery of the $3 million deficiency he suffered as a sold-out junior plus punitive damages, Lawler has attempted to accomplish by indirection what [section] 580b prohibits. [] . . . Surely Lawler's fraud claim must founder for (continued) failure to sustain the element of reasonable reliance. As a matter of law it is unreasonable to rely on an illegal waiver, especially when you are the party insisting on it"].)

Jacobs makes another minor point that there was no evidence at the underlying trial that he, as distinguished from his partner, committed fraud or negligent misrepresentation since he was not present when his partner and Lawler negotiated the anti-deficiency waiver. Given that there is no fraud or perjury inherent in this claim, the jury's verdict triggers the conclusive presumption of probable cause as to this point.

advised Lawler about the anti-deficiency laws near the time the parties agreed to the transaction, (3) Lawler's attorney gave deposition testimony contradicting Lawler's later denials that the two had conversed about the anti-deficiency issue, (4) Lawler's attorney gave deposition testimony indicating that he advised Lawler two years after the fact that the waiver was unenforceable (this presumably sets up the inference that the attorney similarly advised Jacobs at the time of the transaction), (5) Jacobs's partner gave deposition testimony indicating that he told Lawler that the waiver was unenforceable but Lawler said that he required the waiver even if it was unenforceable, and (6) Lawler's attorney gave deposition testimony contradicting a Lawler declaration, which stated that the attorney represented Lawler for a purpose that did not include anti-deficiency advice.[6]

The difficulty with accepting Jacobs's position is that Jacobs made his argument repeatedly in the underlying action. Jacobs advanced his summary judgment motion on the basis that Lawler was lying and could not have relied on Jacobs's promise to pay and waiver; he argued in limine motions, evidentiary

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[6] Jacobs lists more examples of evidence that supposedly shows Lawler's perjury. One might say that they are more obscure than those we have listed. But they are of the same character: evidence in the record of the underlying action. In a related lament, Jacobs sometimes claims that perjury evidence was "suppressed" in the underlying case by the trial court's erroneous rulings sustaining Lawler's evidentiary objections grounded (continued) on attorney-client privilege and the like. Since Jacobs fails to cite authority for the proposition that a litigant can collaterally attack evidentiary rulings in another case, we pass this nuance without further consideration. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627.)

questions, and his case to the jury on the theory that Lawler was lying and could not have relied on Jacobs's promise to pay and waiver; and he argued his post-trial motions on the theory that Lawler was lying and could not have relied on Jacobs's promise to pay and waiver. At each step of the way, the fact finder rejected Jacobs's claims.

It is true that Jacobs raised the perjury issues on appeal and the court of appeal never reached them. From this, Jacobs argues that collateral estoppel does not apply. But the issue here is not collateral estoppel but the fraud or perjury exception to the interim-adverse-judgment rule. More precisely, however, the question at issue is what type of evidence is competent to show that the exception applies. Jacobs fails to cite a single authority to support his argument that one can relitigate adversely decided factual matters for purposes of the exception to the rule. The few cases that do discuss the exception to the rule do not suggest that one can so relitigate.

In *Carpenter v. Sibley* (1908) 153 Cal. 215, the plaintiff sued the defendants for malicious prosecution of an underlying criminal case in which the plaintiff had suffered a conviction, won a reversal on appeal, and received a dismissal upon the prosecutor's motion. The plaintiff alleged that the defendants had " 'during the trial of said case, made use of the false and perjured evidence of thieves and perjurers, which they had corruptly and maliciously procured by means of promises of immunity from crimes and other inducements, and offered and introduced such testimony, which they then and there knew to be false.' " (*Id.* at p. 216) He also alleged that the defendants

had coerced the jury into bringing in a false verdict. The trial court sustained the defendants' demurrer, but the court reversed the judgment on the basis of the fraud or perjury exception to the interim-adverse-judgment rule. Though the fraud and perjury facts are skeletal because of the case's pleading posture, there is no suggestion that those facts were litigated in the underlying criminal action. Given that it is incongruous to litigate jury-intimidation facts to the jury being intimidated, one can safely infer that the fraud and perjury facts had not been litigated in the underlying action.

In *Roberts v. Sentry Life Insurance, supra*, 76 Cal.App.4th 375, the plaintiff sued the defendants for malicious prosecution of an underlying fraud action in which the trial court had denied a defense motion for summary judgment but later rendered a defense judgment. The defendants, relying on the summary-judgment denial in the underlying action, successfully moved for summary judgment on the basis of the interim-adverse-judgment rule. The plaintiff appealed, and the court affirmed the judgment. The plaintiff argued on appeal that the summary-judgment denial was based on false evidence pertaining to the reliance element of the fraud cause of action. The court proceeded to examine the evidence. Thereafter, it concluded that the denial was not based on false evidence. But the supposedly false evidence was a 1987 declaration used to oppose the plaintiff's summary-judgment motion and the evidence proving that it was false was a 1998 deposition used to oppose the defendants' summary judgment motion in the malicious prosecution action. (*Id.* at pp. 381, 385.) The falsity of the evidence was therefore not litigated in the

underlying fraud action.

In *Fairchild v. Adams* (1959) 170 Cal.App.2d 10, the plaintiff sued the defendant for malicious prosecution of an underlying will contest in which a jury found undue influence, the trial court denied post-trial motions attacking the sufficiency of the evidence, the court of appeal affirmed the judgment on the basis that the evidence was sufficient, but the Supreme Court reversed after concluding that the evidence was insufficient. The plaintiff alleged that the defendant had procured the jury's verdict by perjured testimony. The trial court found no perjured testimony and rendered judgment for the defendant. The court affirmed the judgment. Again, the falsity of the evidence was not litigated in the underlying will contest. The relevant evidence was the defendant's testimony in the malicious prosecution action, which supposedly exposed the defendant's testimony in the will contest as perjurous rather than inconsistent. (*Id.* at p. 16.)

"[T]he true basis for the rule with regard to the conclusive presumption of probable cause . . . may be articulated in the following question: Did a trier of fact after a fair adversary hearing reach a determination on the merits against the defendant in the prior proceeding? If the answer is in the affirmative, the defendant in that proceeding may not thereafter institute an action for malicious prosecution, whether the matter was criminal or civil, even though he [or she] shows that the determination in question was reversed on appeal or set aside by the trial judge. The rule has its origin in policy considerations to which we have already adverted, that persons who initiate

criminal or civil proceedings should not thereafter be subjected to litigation to assess damages against them unless it be shown that they acted without probable cause; that if probable cause is determined by the trier of fact in the prior proceedings, it is not subject to reevaluation. Although in application the rule may result in an occasional injustice, its salutary effect outweighs the detriments." (*Cowles v. Carter, supra,* 115 Cal.App.3d at p. 358.)

Inherent in this rationale is that a malicious-prosecution plaintiff cannot set up allegations of fraud and perjury for purposes of the exception to the interim-adverse-judgment rule when the allegations are the same ones that were fairly presented and rejected in the underlying action.

We therefore conclude that Jacobs cannot state a prima facie case for application of the fraud or perjury exception to the interim-adverse-judgment rule. The interim-adverse-judgment rule therefore operates as a conclusive presumption of probable cause to bring the underlying action. Jacobs's malicious prosecution action therefore fails and he necessarily failed to carry his burden in opposition to defendants' motions to strike. The trial court therefore correctly granted the motions.

Jacobs contends that the trial court erred by denying his motions for discovery and continuance of the hearing date so as to conduct the discovery. (§ 425.16, subd. (g) ["All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of

the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision"].) According to Jacobs, he showed good cause for discovery of information relevant to probable cause and malice that had never been disclosed or produced to him by Lawler, Lawler's attorney who advised him during the purchase transaction, Clark & Korda, and Ropers.

But Jacobs patently fails to carry his burden on appeal. Without question, section 425.16, subdivision (b), sets out a discretionary power to allow discovery notwithstanding a general prohibition of discovery. (See *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 868.) A reviewing court does not disturb the exercise of a trial court's discretion unless the complaining party establishes an abuse of discretion, which is generally whenever the trial court has exceeded the bounds of reason. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) Nowhere does Jacobs frame an abuse-of-discretion argument. Instead of focusing on the factors supporting the trial court's decision and explaining why it was irrational to rely on those factors, he merely reargues that he showed good cause.

"Arguments should be tailored according to the applicable standard of appellate review." (*Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1388.) Failure to acknowledge the proper scope of review is a concession of a lack of merit. (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1021.) " '[I]t is an attempt to place upon the court the burden of discovering without assistance from appellant any

weakness in the arguments of the respondent. An appellant is not permitted to evade or shift his [or her] responsibility in this manner.' [Citations.]" (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 102.)

We nevertheless observe that Jacobs could not demonstrate that the trial court's decision was beyond reason.

Jacobs asserts, "discovery would conclusively establish that Lawler did not in fact rely on [Jacobs's] waiver." But he does not dispute that the discovery he sought from Lawler and his attorneys was focused on subjects that (1) are protected by the attorney-client privilege, and (2) were protected from disclosure in the underlying action by defendants' successful assertion of the attorney-client privilege. It is simply not irrational to deny a motion to discover information that (1) is privileged from discovery, (2) had been protected from discovery in prior litigation, and (3) pertains to an issue that had been unsuccessfully advanced (we repeat) repeatedly in the prior litigation.

Jacobs sometimes urges that defendants' have waived the attorney-client privilege in this case by voluntarily placing privileged communications directly in issue. He refers to defendants' various briefs in which they (1) deny the fraud and perjury allegations, and (2) assert that further discovery is privileged in any event. The point has no merit.

Defendants placed no privileged communications in issue. They placed nothing in issue given that Jacobs sued them. Defendants simply had nothing to prove. (Evid. Code, § 550.) It is true that defendants

filed the motion to strike. But their only burden was to prove that the action was subject to the anti-SLAPP statute. Jacobs then assumed the burden to prove, among other things, that the fraud-or-perjury exception to the interim-adverse-judgment rule applied.

Jacobs cites no authority for the proposition that he is entitled to discover privileged information on waiver principles in order to carry his burden of proof merely because the defendants deny the existence of what he wants to prove. The cases he cites all deal with litigants who have the burden of proof and then assert privilege. (See *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 604 [" 'fundamental fairness' " may require disclosure of otherwise privileged information or communications where plaintiff has placed in issue a communication which goes to the heart of the claim in controversy]; *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 128 [employer defendant with burden to prove adequacy of investigation where the investigation was undertaken by attorney has waived attorney-client privilege and work product doctrine]; *Chicago Title Ins. Co. v. Superior Court* (1985) 174 Cal.App.3d 1142, 1149 [implied waiver occurs where the plaintiff has placed in issue a communication which goes to the heart of the claim in controversy]; *Fremont Indemnity Co. v. Superior Court* (1982) 137 Cal.App.3d 554 [plaintiff waives self-incrimination privilege with reference to factual issues tendered by complaint by filing an action to recover under a fire insurance policy].)

A defendant who prevails on a special motion to strike is entitled to recover attorney fees and costs. (§

425.16, subd. (c) ["In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs"].) Although the statute does not expressly authorize the recovery of fees incurred on appeal, a party who is entitled to recover fees in the trial court is ordinarily entitled to recover fees on appeal unless the statute authorizing a fee award expressly provides otherwise. (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927-929.) The anti-SLAPP statute does not preclude the recovery of fees incurred on appeal. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 659, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) Accordingly, defendants are entitled to make a motion in the trial court to recover their attorney fees and costs incurred on appeal.

DISPOSITION

The order re special motions to strike is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.

APPENDIX C

FILED
JUN 25 2002
KIRI TORRE
Chief Executive Officer/Clerk
Superior Court of CA,
County of Santa Clara
By "s/_____"
WANDA WALDERA

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

Justin M. Jacobs,

Plaintiff

Case No. CV 804380

ORDER RE: SPECIAL MOTIONS TO STRIKE (C.C.P. § 425.16)

v.

H. Roger Lawler, et al.,

Defendants.

The Special Motions to Strike by Defendants John W. Clark, Mary E. Arand and Clark & Korda ("the Clark Defendants") and Defendants Robert S. Luft, W. Bryon Levy, Charles G. Rigg and Ropers, Majeski, Kohn & Bentley ("the Ropers Defendants"), and the Joinder to the Special Motion to Strike by the Ropers Defendants by Defendant H. Roger Lawler came on for hearing before the Honorable Kevin E. McKenney on June 25,

2002 at 9:00 a.m. in Department 16. The matter having been submitted, the Court orders as follows:

The Ropers Defendants' Request for Judicial Notice is DENIED as to Exhibit 47. The court dockets are not relevant to the issues presented in this case. (Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 Cal.4th 1057, 1063.) The Ropers Defendants' Request for Judicial Notice is otherwise GRANTED, in its entirety. (Evidence Code §§ 452(d)(1), 453.)

The Clark Defendants' Request Judicial Notice and Plaintiff's Request for Judicial Notice are GRANTED, in the entirety.

Judicial notice does not extend to the "truth" of the documents' contents. (Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 Cal.4th 1057, 1063.)

Defendant Lawler's joinder to the Ropers Defendants' Special Motion to Strike is GRANTED.

The Clark Defendants' and the Ropers Defendants' respective Special Motions to Strike are GRANTED. (C.C.P. § 425.16) Plaintiff has not presented evidence that shows he has a "probability of prevailing at trial, since he cannot establish that Defendants herein did not have "probable cause" to initiate and maintain the underlying action.

Dated: June 25, 2002 "s/_____"
Kevin E. McKenney
Judge of the Superior Court

APPENDIX D-1

(ENDORSED)
FILED
JUN 13 2002
KIRI TORRE
Chief Executive Officer/Clerk
Superior Court of CA,
County of Santa Clara
By "s/ initialed " DEPUTY

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

Justin M. Jacobs, Case No. CV 804380

Plaintiff ORDER

v.

H. Roger Lawler, et al.,

Defendants.

The Motion to Allow Discovery Pursuant to Code of Civil Procedure § 425.16(g) and to Continue Hearing Date on Motions to Strike by Plaintiff Justin M. Jacobs came on for hearing before the Honorable Gregory H. Ward on June 13, 2002 at 2:00 p.m. in Department 9.

The matter having been submitted, the Court orders as follows:

Defendant H. Roger Lawler's request for Judicial Notice is GRANTED in its entirety. (Evidence Code §§ 452(d), 453.)

Plaintiff Jacobs' Motion to Allow Discovery is DENIED. Plaintiff has not established "good cause" to conduct specified discovery. (Code of Civil Procedure § 425.16(g).)

Plaintiff Jacobs' Motion to Continue Hearing Date on Motions to Strike is also DENIED. Plaintiff has failed to identify any compelling reason for the Court to order such a continuance in the face of the statutory requirement that hearings on special motions to strike be set "not more than 30 days after service[.]" (Code of Civil Procedure § 425.16(f).)

Dated: 6-13-02 "s/_____"
Gregory H. Ward
Judge of the Superior Court

APPENDIX D-2

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

Justin M. Jacobs,

Plaintiff,

v.

H. Roger Lawler, et al.,

Defendants.

Case No. CV 804380

ORDER

[re: Plaintiff's Ex Parte Motion for Reconsideration of Motion to Allow Discovery]

Plaintiff's ex parte motion for reconsideration is denied.

6-25-02

"s/_____"
GREGORY H. WARD

APPENDIX E-1

FILED
Nov 13 2002
KIRI TORRE
Chief Executive Officer/Clerk
Superior Court of CA,
County of Santa Clara
By "s/ [initialed] " DEPUTY
WANDA WALDERA

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
CIVIL DIVISION,
DOWNTOWN SUPERIOR COURT

JUSTIN M. JACOBS, Case No. CV 804380

Plaintiff

vs.

MEMORANDUM OF DECISION AND ORDER

H. ROGER LAWLER, et al.,

Defendants.

The Motion for attorney fees was heard before the Honorable Kevin E. McKenney on August 29, 2002, at 9:00 a.m. in Department 16. Further briefing was requested and the matter was submitted upon filing of plaintiff's response to supplemental declaration of Susan H. Handelman in support of motion for attorney fees. The matter having been submitted, the Court orders as follows:

The motion of Ropers, Majeski, Kohn & Bentley, Robert S. Luft, W. Byron Levy, and Charles G. Rigg [hereinafter "Ropers"] is granted. Although a statement of decision as requested by plaintiff is unnecessary [*Ketchum v. Moses* (2001) 24 Cal.4th 1122, at 1140], following is an explanation for this decision.

Trope v. Katz (1995) 11 Cal.4th 274 does not preclude a successful attorney defendant in a CCP §425.16 motion from recovering attorney fees. *Trope* is limited to attorney fees in a contract action pursuant to CC §1717. It was the intent of the Legislature that CCP §425.16 "shall be construed broadly." [CCP §425.16(1).] Finally, *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, at 1423, authorized a *pro se* attorney to recover her own fees.

Ropers is entitled to recover the fees and costs sought. Plaintiff presented no evidence that compels the conclusion that $275 an hour (or any lesser earlier fee or associate fee) was excessive in view of the charges for legal work in this community. Ropers was confronted with a case with a protracted and contentious history. They were engaged in a serious, no-holds barred battle. They had to aggressively oppose plaintiff to protect themselves. Whether or not another law firm charged less is a factor to consider, but is not determinative.

The court disagrees that Ropers "prosecuted their defense as a new profit center for the firm," [Plaintiff's opposition, page 1, line 8.] and that "excessive and duplicative work [was] performed by them." [*Supra*, page 1, line 6.] The court was satisfied that Ms. Handelman's hourly rate was not unique to this case and that Ropers did not have insurance coverage under $125,000.

Plaintiff's objections to the supplemental declaration of Ms. Handelman are overruled. The court asked for more information about her background.

In concluding, the comment in *Ketchum v. Moses, supra*, at page 1141 is instructive: "The amount of litigation on this issue typically lies in the plaintiff's hands: having litigated the matter tenaciously, Ketchum " 'cannot . . . be heard to complain about the time necessarily spent by the [defendant] in response."

The amount of time spent on this case was necessary and the hourly rates were appropriate.

The motion for attorney fees of $57,381.00 and for costs of $6,606.28 is granted. Moving party is directed to prepare a judgment consistent with this order.

Dated: November 7, 2002

"s/_____"
Kevin E. McKenney
Judge of the Superior Court

APPENDIX E-2

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Attorneys for Defendants JOHN W. CLARK, MARY E. ARAND, and an entity incorrectly described as CLARK & KORDA, a partnership

FILED
2002 Sept 11 AM 6:12
KIRI TORRE
Chief Executive Officer/
Clerk
Superior Court of CA,
County of Santa Clara
By "s/_____" DEPUTY
J. Paura

JUSTIN M. JACOBS,
Plaintiff,
v.
H. ROGER LAWLER; CLARK & KORDA, a partnership; JOHN W. CLARK; MARY E. ARAND, ROPERS, MAJESKI, KOHN & BENTLEY, a Professional Corporation, ROBERT S. LUFT; W. BYRON LEVY; CHARLES G. RIGG,
Defendants.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

Case No. CV 804380
Complaint filed: January 9, 2002

ORDER GRANTING DEFENDANT'S MOTION FOR ATTORNEYS' FEES AND COSTS

Date: August 29, 2002
Time: 9:00 a.m.
Dept.: 4
Judge: Hon. Kevin E. McKenney

Defendants John W. Clark, Mary E. Arand and Clark & Korda's (collectively referred to herein as "C & K") motion for attorneys' Fees and costs pursuant to Code of Civil Procedure Section 425.16 came on for hearing before this Court on August 29, 2002 at 9:00 a.m. After considering all papers filed in support an in opposition to the motions, as well as the arguments presented at the hearing of the motions, the Court rules as follows:

Defendants C&K's motion for attorney fees and costs are granted pursuant to Code of Civil Procedure Section 425.16(c).

The C&K defendants are awarded $33,623.35 for their attorney fees and costs against plaintiff Justin M. Jacobs.

Dated: *September 27, 2002*

"s/_____"
Honorable Kevin E. McKenney
Judge of the Superior Court

APPROVED AS TO FORM
Dated:

_____
Terence F. Young

APPENDIX E-3

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FILED
2002 Sept 11 AM 6:12
KIRI TORRE
Chief Executive Officer/
Clerk
Superior Court of CA,
County of Santa Clara
By "s/_____" DEPUTY
E. Hernandez

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SANTA CLARA

JUSTIN M. JACOBS, JR.,
Plaintiff,

v.

H. ROGER LAWLER; CLARK & KORDA, a partnership; JOHN W. CLARK; MARY E. ARAND; ROPERS, MAJESKI, KOHN & BENTLEY, a Professional Corporation, ROBERT S. LUFT; W. BYRON LEVY; CHARLES G. RIGG,

Defendants.

Case No. CV 804380

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ORDER GRANTING DEFENDANT'S MOTION FOR ATTORNEYS' FEES AND COSTS

Date:
August 29, 2002
Time: 9:00 a.m.
Dept.: 4
Judge: Hon. Kevin E. McKenney

Defendant's Motion for Attorney's Fees and Costs, filed on behalf of Defendant H. Roger Lawler, came on regularly for hearing before the Honorable Judge Kevin E. McKenney on August 29, 2002, in the above-entitled court. Weldon S. Wood appeared on behalf of Defendant Roger Lawler and Terence F. Young appeared on behalf of Plaintiff Justin Jacobs.

Oral argument having been fully heard, the court having been fully advised, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That Defendant H. Roger Lawler's motion for attorney's fees and costs pursuant to CCP §425.16(c) be GRANTED and that defendant H. Roger Lawler be awarded attorney's fees and costs in the amount of $27,285 against Plaintiff Justin M. Jacobs.

APPROVED AS TO FORM

Dated: *9/4/02* "s/_____"
TERENCE F. YOUNG
Attorney for Plaintiff
Justin M. Jacobs

IT IS SO ORDERED.

Dated: *9/11/02* "s/_____"
Honorable Kevin E. McKenney
Judge of the Superior Court

APPENDIX F

California Constitution

Article I §§ 2 Speech and press

(a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

. . .

Article I §§ 3 Assembly and petition

The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

Article I §§ 7 Due process; Equal protection; Privileges and immunities

(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; . .

Article I §§ 16 Trial by jury

Trial by jury is an inviolate right and shall be secured to all, . .

APPENDIX G

California Code of Civil Procedure §§ 425.16.

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that

determination.

(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

. . .

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the

court require a later hearing.

. . .

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent." . .

(j) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

APPENDIX H

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JUSTIN M. JACOBS, JR.,
Plaintiff and Appellant,
v.
H. ROGER LAWLER, CLARK & KORDA, a partnership, JOHN W. CLARK, MARY E. ARAND, ROPERS, MAJESKI, KOHN & BENTLEY, a Professional Corporation, ROBERT S. LUFT, W. BYRON LEVY and CHARLES G. RIGG,

Defendants and Respondents.

Sixth District
Court of Appeal
Case No. H024924

Related Cases:
H024905, H025333 & H025583

Santa Clara County
Superior Court
No. CV 804380

PETITION FOR REVIEW

STAY REQUESTED

From an Opinion of the Court of Appeal, Sixth Appellate District

---

On Appeal from an Order Granting Respondents' Special Motion to Strike Pursuant to California Code of Civil Procedure § 425.16(b) The Honorable Kevin E. McKenney Judge of the Superior Court, County of Santa Clara

---

On Appeal from an Order
Denying Appellant's Request for Discovery
Pursuant to California
Code of Civil Procedure § 425.16(g)
The Honorable Gregory Ward
Judge of the Superior Court,
County of Santa Clara

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IMPORTANT ISSUES OF LAW RAISED

1. The anti-SLAPP statute, CCP § 425.16, as interpreted, applied, and executed by the courts of California, violates Article 1 of the California Constitution, and the First and Fourteenth Amendments to the United States Constitution, because:

a) Such state action irrationally and arbitrarily infringed upon, burdened, punished, deprived and denied Appellant his constitutional rights to a fair trial by jury, to necessary discovery, to freedom of speech, to petition the government for redress of grievances, and to equal protection of the laws, all without due process of law; and

b) Such state action is so overly broad, vague and uncertain that it irrationally and arbitrarily abridged, burdened, punished, and deprived Appellant of liberty and property without due process of law.

2. The fraud-perjury exception to the interim-adverse-judgment presumption of probable cause, as stated in *Roberts v. Sentry* (1999) 76 Cal.App.4th 375, 384, *Wilson v. Parker* (2002) 28 Cal.4th 811, 815, 817-818, 820, 825-826, and *Zamos v. Stroud* (2004) 32 Cal.4th 958, 973 (fn.10), is the law in California, and such presumption was rebutted in Appellant's malicious prosecution action, as a matter of law.

3. As a matter of law, if no reasonable attorney could believe that an interim-adverse-judgment was legally valid, then it does not create a presumption of probable

cause.

4. The doctrine of implied waiver of the attorney-client privilege as stated in *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 604, ("the *Mitchell* Doctrine"), is the law in California, and it applies to Respondents in Appellant's malicious prosecution action, as a matter of law. Such implied waiver by Respondent Lawler in the underlying fraud actions also applies in Appellant's subsequent malicious prosecution action, as a matter of law.

5. As a matter of law, Appellant has *prima facie* alleged and substantiated with admissible evidence:

a) That Appellant has a probability of prevailing at trial on his malicious prosecution action;

b) That the interim-adverse-rulings in the underlying case, i.e., the denial of summary judgment, the jury verdict, and Respondent Lawler's reversed judgment, were all procured by fraud, perjury or materially false facts, and do not create a presumption of probable cause in Appellant's malicious prosecution action;

c) That Appellant had a right to reasonable discovery and a jury trial before the motions to strike his complaint were ruled on; and

d) That Respondents have impliedly waived their attorney-client privileges with respect to Appellant's malicious prosecution action.

6. As a matter of law, the plaintiff in a malicious prosecution case may relitigate issues of fraud and perjury which were presented in the underlying case, *inter alia*, for purposes of establishing the fraud-perjury exception to the interim-adverse-judgment rule and the elements of the tort, where such issues are not precluded by collateral estoppel.

7. As a matter of law, neither the doctrine of collateral estoppel, nor any other doctrine, precludes otherwise admissible evidence emanating from an underlying case to be used in a subsequent malicious prosecution action in order to establish the elements of the tort and the fraud-perjury exception to the interim-adverse-judgment presumption of probable cause:

a) Where there never was an issue of fraud or perjury that was ruled on in the underlying case; or

b) Where the judgment on the alleged malicious prosecutor's (Respondent Lawler's) actions in the underlying case was reversed on its merits, as a matter of law, and such interim-adverse-rulings only related to such reversed judgment.

8. As a matter of law, the issue of Respondents' implied waivers of their attorney-client privilege, *inter alia*, pursuant to the doctrine contained in the *Mitchell v. Superior Court, supra*, 37 Cal.3d 591, 604, is not precluded by collateral estoppel from being raised in a subsequent malicious prosecution action:

a) Where the only issue of implied waiver of the attorney-client privilege ruled on in the underlying case was based on a different rule of law

(substantial disclosure); or

b) Where the judgment on the alleged malicious prosecutor's (Respondent Lawler's) actions in the underlying case was reversed on its merits, as a matter of law, and such implied waiver only related to such reversed judgment.

THE NATURE OF THE CASE

In the underlying case, Respondents filed and prosecuted verified actions against Appellant, *inter alia*, for false promise fraud, alleging that Respondent Lawler relied on Appellant's purported contractual waiver of his anti-deficiency protection (CCP § 580b). Lawler also testified under penalty of perjury that he so relied.

Appellant countered with evidence that Lawler had insisted on such anti-deficiency waiver, and that Lawler's attorney Michael McCracken had advised Lawler concerning anti-deficiency protection, so that Lawler could not have relied on Appellant regarding the validity of such anti-deficiency waiver. After a jury trial, a judgment for Lawler, and Appellant's appeal, the Court of Appeal in the underlying case reversed Lawler's judgment on his actions on their merits, as a matter of law.

Appellant then filed a verified complaint for malicious prosecution against Lawler and his attorneys, and demanded a jury trial. Before answering, Respondents filed special motions to strike Appellant's complaint pursuant to CCP § 425.16(b). The trial court then denied Appellant's timely motion for limited discovery under CCP § 425.16(g), summarily granted

Respondent's motion to strike Appellant's complaint on the ground that Appellant could not show lack of probable cause, and awarded Respondents their attorney fees and costs pursuant to CCP § 425.16(c).

The Court of Appeal affirmed the trial court's rulings on the grounds that Appellant was precluded from relitigating the issues of Respondents' frauds, perjuries, and their waivers of the attorney-client privilege, because such issues had been presented and rejected in Lawler's underlying actions. Appellant's motion for re-hearing was denied on May 14, 2004.

REASONS FOR GRANTING THE PETITION

The issues presented by the Court of Appeal's decision and by this Petition are of widespread and statewide public importance. They involve important issues of first impression, *inter alia*, concerning:

1. The irrational and arbitrary infringement, punishment, and denial of constitutional rights to a fair trial by jury, to freedom of speech, to petition for redress of grievances, to normal discovery, to due process of law, and to equal protection of the laws;

2. The vague and overly broad application of CCP § 425.16 and its punitive motion to strike to practically every lawsuit and aspect of life in California, which irrationally denies, abridges, burdens and punishes constitutionally protected rights;

3. The validity and applicability of the fraud-

perjury exception to the interim-adverse-judgment presumption of probable cause, and as stated in *Roberts v. Sentry, supra*, 76 Cal.App.4th 375, 384, *Wilson v. Parker, supra*, 28 Cal.4th 811, 817-818, 825-826, and *Zamos v. Stroud, supra*, 32 Cal.4th 958, 973 (fn.10); and

4. The validity and applicability of the implied waiver of the attorney-client privilege, based on voluntarily placing in issue a privileged communication which is critical to Appellant's case, and as stated in the "*Mitchell* Doctrine".

In the process, basic civil liberties, long standing fundamental rights, due process of the law and simple justice have been ignored and denied.

The decision of the Court of Appeal also creates conflicts with other published decisions, and purports to overrule several decisions of the California Supreme Court.

In the case at bar, the anti-SLAPP statute and its motion to strike were arbitrarily misapplied to Appellant's action without scrutiny, question or rational justification. Appellant's constitutional rights to a fair jury trial, to state Appellant's grievances in open court to a jury of his peers and to the press, to discover necessary facts, to due process of the law, and to have a jury determine the validity of his petition, were all summarily denied as a matter of course. Whereas, the Respondents were arbitrarily accorded all of such rights in the underlying case. This is not due process nor equal protection of the law. (*Winters v. New York* (1948) 333 U.S. 507; *Logan v. Zimmerman* (1982) 455 U.S. 422;

Willowbrook v. Olech (2000) 528 U.S. 562)

As a matter of law, the courts erroneously denied Appellant's timely motion under CCP § 425.16(g) for limited discovery of information in the exclusive custody and control of Respondents (AA2640-2641,AA2677), which discovery was necessary to show that Respondents knew, before and during the prosecution of Lawler's actions, that such actions lacked probable cause and were prosecuted with malice. (AA1503-1524,1892-1904) To paraphrase the Court in *Citi-Wide v. Golden* (2003) 114 Cal.App.4th 906, 912-913:

> [If Lawler and the other Respondents knew] "that [Lawler's] claim [was] groundless, [they could] not have [had] an actual or honest belief in its validity, and [they] may not escape liability for commencing an action based on such a claim merely because a reasonable man might have believed it was meritorious."
> (citing *Bertero v. National* (1974) 13 Cal.3d 43, 55.)

Also see *Zamos v. Stroud* (2004) 32 Cal.4th 958, where the Court determined that the Respondent attorneys also could be liable for malicious prosecution if they discovered lack of probable cause after filing Lawler's complaint.

Such knowledge is in Respondents' exclusive custody and control, and can only be determined after reasonable discovery by Appellant. The denial of such discovery before the trial court ruled on lack of probable cause and granted Respondents' motion to strike Appellant's complaint, was both prejudicial error and a denial of

Appellants right to due process of law. (*Lafayette Morehouse v. Chronicle* (1995) 37 Cal.App.4th 855, 867, 868) It also deprived Appellant of his constitutional right to a jury trial.

As a matter of law, the courts also erroneously denied Appellant his right to have a jury decide threshold factual questions concerning Respondents' knowledge, probable cause and malice, before the trial court determined the legal question of whether such facts negate probable cause. Because there was a dispute as to the state of Lawler's prior knowledge as to the enforceability of Appellant's purported anti-deficiency waiver, and thus as to the issues of Lawler's reliance, probable cause and malice, and since such issues turn on the resolution of that dispute, then as pointed out (and paraphrased) in *Citi-Wide v. Golden, supra*, 114 Cal.App.4th 906, 912-913:

> "[Because] there is evidence that [Lawler and the other Respondents] may have known *that the factual allegations on which* [Lawler's] *action depended were untrue,* the jury must determine what facts [Lawler and the other Respondents] knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding." (citing *Sheldon v. Albert,* (1989) 47 Cal.3d 863, 881.)

The denial of such a jury determination before the trial court ruled on the issue of probable cause and granted Respondents' motion to strike, was both prejudicial error and a denial of Appellant's constitutional rights to due process of law and to a jury trial.

The courts failed to consider the vast amount of admissible evidence and legitimate inferences which Appellant submitted in order to establish a *prima facie* case. The Respondents offered no admissible evidence to challenge Appellant's evidence on any of the issues decided by the courts. Therefore, as a matter of law, Appellant *prima facie* rebutted any presumption of probable cause, established the elements of his malicious prosecution action, established that Respondents had waived their attorney-client privilege, and substantiated a probability that he would prevail at a jury trial on the merits. Respondents' anti-SLAPP motions to strike Appellant's complaint should have been denied as a matter of law. *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 827-828; *Briggs v. Eden Council* (1999) 19 Cal.4th 1106, 1123. Failure to do so denied Appellant his constitutional rights to due process and equal protection of the laws, and a jury trial.

The justification that the Court of Appeal asserted for the granting of Respondents' motions to strike, and for the denial of Appellant's rights, was that Respondents' frauds, perjuries and waivers of attorney client-privilege, which only related to Lawler's fraud actions, had been litigated in such underlying fraud actions. (Appellate Opinion, p.10) In effect, the Court of Appeal asserted that the doctrine of collateral estoppel precluded the raising of such issues or the presentation of evidence relating thereto in the current malicious prosecution action, despite the fact that Respondent Lawler's judgment in his underlying fraud actions had been declared void, unenforceable and was reversed on its merits, as a matter of law. *Lawler v Jacobs* (2000) 83 Cal.App.4th 723, 736-738.

It is black letter law that "a party will be collaterally estopped from relitigating an issue only if . . . there was a final judgment on the merits" in the prior case. *Clemmer v. Hartford Insurance* (1979) 22 Cal.3d 865, 874 (emphasis added); *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 813. But in the underlying case, there was no final judgment on the merits of Lawler's actions, because it had been reversed. Also, if Lawler's fraud actions were always void and unenforceable, then no reasonable attorney (judge or jury) could ever have believed that any interim-adverse-judgment based thereon created a presumption of probable cause. (*Sheldon v. Albert, supra*)

The Court of Appeal's affirmation of the trial court's rulings was also based on a new *ad hoc* doctrine that Appellant cannot relitigate, or present evidence regarding, issues of fraud, perjury and waiver of the attorney-client privilege, that were presented in the underlying case, even though they are not precluded by the doctrine of collateral estoppel. (App. Opinion, pp.10,12)

Such orders and affirmations constituted reversible error as a matter of law, denial of Appellant's constitutional rights, and a miscarriage of justice.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The following facts are undisputed. On February 7, 1989, Respondent Lawler met with Appellant's partner, Norman MacKay, to sign an agreement to purchase Lawler's 91 acres of raw land for $6 million cash and a $3 million promissory note. (AA2095-2100) Lawler then

insisted that MacKay insert language in the note which waived Appellant's antideficiency protections, in exchange for Lawler's agreement to subordinate the note to Appellant's proposed bank loan. (AA2202;*Lawler v. Jacobs,supra*,83Cal.App.4that726) MacKay later testified that he responded to Lawler that a waiver of anti-deficiency protection was not enforceable. (AA1982,2192)

Lawler then phoned his attorney Michael McCracken and discussed the antideficiency waiver language with him, and McCracken gave Lawler advice about anti-deficiency. (AA2041-2043,2047-2048;2154-2155,2133,2136, 2138-2141) The purchase agreement, with the note and anti-deficiency waiver attached, was then executed by Lawler and MacKay.

The next day, February 8, 1989, Lawler faxed an executed copy of the agreement and the note with Appellant's anti-deficiency waiver attached, to his attorney McCracken along with Lawler's handwritten letter requesting McCracken's advice on the legality and enforceability of Appellant's personal liability on the note. (AA2129-2130,2156) In a 1992 deposition, McCracken testified that he gave Lawler advice concerning anti-deficiency liability on February 7th or on February 8th. (AA1595-1596;1599-1600)

On June 12, 1989, Lawler sold the land to Appellant for $6 million down, and took back a $3 million purchase money deed of trust. The bank loaned Appellant purchase money funds, but no money was ever loaned to Appellant for construction purposes; and no construction financing ever became a senior lien against Lawler's security interest. (AA1409;AA1413; *Lawler*

v.Jacobs,supra,83Cal.App.4that729)

Lawler then challenged the validity of his grant deed to Appellant, which created a cloud on Appellant's title. (AA1977,2453-2464) As a consequence, Appellant's proposed subdivision project failed, the bank foreclosed on its purchase money loan, and Lawler became a sold out junior creditor.

On June 13, 1991, Lawler and the Clark & Korda Respondents filed a Complaint (which was amended as to attorney fees by Ropers in 1994) against Appellant, requesting a purchase money deficiency judgment for $3 million, and alleging tort damages for false promise fraud, deceit and negligent misrepresentation. (AA0110-0136) Appellant cross-complained based on different facts for breach of contract and fraud by Lawler. (AA1351-1390,0138-0147)

Lawler's Complaint, which was verified by Lawler in his 1992 Declaration (AA2061-2062), alleged that Lawler relied on Appellant's anti-deficiency waiver, and that Lawler would not have sold the land if he had known that Appellant's anti-deficiency waiver was unenforceable. (AA0116-0117,0119, 0121)

At his deposition, Lawler testified that he had discussed the anti-deficiency waiver language with his attorney McCracken before the agreement (including the anti-deficiency waiver) was signed, and that McCracken gave him advice concerning the same. (AA1595-1596;1599-1600) Lawler also testified that he gave the agreement with the anti-deficiency waiver attached to McCracken for review, and that thereafter he received advice from McCracken concerning the same

before close of escrow. (AA1599-1600)

Appellant moved for summary judgment on February 28, 1992, arguing that Lawler had relied on his attorney McCracken and not on Appellant with regard to the anti-deficiency waiver, and therefore that Lawler could not as a matter of law establish the justifiable reliance element of his fraud actions. (AA0149-0171,0169-0171)

At this point, the firm of Ropers, Majeski, et. al. ("Ropers"), a large and influential local law firm with well over 100 lawyers, was substituted in as Lawler's attorneys. (AA2050-2051) Respondent Levy of Ropers then prepared Lawler's Declaration in Opposition to Summary Judgment, which was verified by Lawler under penalty of perjury. In his verified 1992 Declaration, Lawler materially changed his prior story. *Inter alia*, he totally recanted his former deposition testimony concerning his communications with McCracken, he claimed that McCracken had never been his attorney for purposes of anti-deficiency, and he again claimed that he relied on Appellant's anti-deficiency waiver until after close of escrow. (AA2060-2061) Based on Lawler's perjured Declaration, the court found the existence of "a triable issue of fact" concerning Lawler's reliance, and denied Appellant's Summary Judgment Motion. (AA0205)

On September 17, 1992, Judge Harlen Veal ruled that Lawler had partially waived his attorney-client privilege and ordered that attorney McCracken's deposition be taken. (AA1791-1792,0321-0322,3019-3020)

At his deposition, McCracken testified, *inter alia*, that:

a) McCracken never represented Lawler on any topic concerning the agreement other than the anti-deficiency waiver clause. (AA2128)

b) McCracken gave Lawler advice concerning deficiency liability either during the phone call of February 7th or the next day. (AA2153-2155)

c) In a later conversation with McCracken, that Lawler claimed under oath did not occur, McCracken testified that he gave Lawler advice concerning anti-deficiency legislation, saying that it cannot be waived, it's not enforceable and it's against public policy. (AA2149-2150)

d) Lawler faxed to McCracken his handwritten letter on February 8, 1989, the day after the purported anti-deficiency waiver was signed, along with a copy of the agreement, the note and the waiver, which handwritten letter by Lawler requested:

Mike,

Please check legality and enforceability
of note personal liability of Payor.
Thanks,

Roger
(AA2156,2132)

On June 3, 1996, Respondent Rigg of Ropers filed a

motion in limine to exclude at trial all of McCracken's deposition evidence, and to prevent McCracken from testifying at trial, on the grounds of prejudice to Lawler and that "such evidence has very little probative value of the issues in this case." (AA2420-2421) The trial court unreasonably granted such motion, and McCracken's critical evidence was never allowed to be presented to the jury. (AA0465,0458-0459)

At trial, Lawler again testified to the jury that he relied on Appellant's anti-deficiency waiver. (AA0915-0916,0934-0935,0955-0956) Respondent Luft of Ropers also argued to the jury that Lawler must have relied on Appellant. (AA2428-2432) The jury then returned a verdict in favor of Lawler for $3 million in damages for false promise fraud, but the jury refused Lawler's request for punitive damages. (AA0589,1423) The trial judge entered a judgment for Lawler for $6,765,175.45, which included interest, attorneys fees and costs. (AA1413,1976)

In the spring of 1997, Appellant filed for Chapter 11 bankruptcy which was not dismissed until 2001. (AA1976) During such bankruptcy, Appellant was required by Lawler to pay $675,000.00 to forebear Lawler from executing on his judgment. (AA1413-1414;1976)

On September 11, 2000, the Court of Appeal in *Lawler v. Jacobs, supra*, 83 Cal.App.4th 723, 738, reversed Lawler's judgment as a matter of law. The Court of Appeal held, *inter alia*, that Appellant's "waiver of anti-deficiency protection was void as contrary to statute [CCP § 580b] and public policy."

> "These agreements are unenforceable and cannot serve as the basis for Lawler's action for breach of contract and fraud. . . [The Buyers] inserted the waiver clause at Lawler's insistence . . . [but as] a matter of law it is unreasonable to rely on an illegal waiver, especially when you are the party insisting on it." (*Id.*, pp. 736, 738; emphasis added)

On January 10, 2001, the Supreme Court denied Lawler's petition for review.

On January 9, 2002, Appellant filed a verified complaint (later amended) for malicious prosecution against Lawler and his former attorneys (collectively "Respondents"), alleging *inter alia* that Lawler's causes of action in the underlying case (for false promise fraud and for a contractual purchase-money deficiency judgment) were meritless as a matter of law; and were initiated and prosecuted without probable cause and with malice. Appellant's amended complaint demanded a jury trial. (AA0002-0041)

Before answering, the Respondents countered with separate anti-SLAPP special motions to strike Appellant's complaint pursuant to CCP § 425.16. (AA0043-0066,1134-1160,1438-1440) Respondents submitted many hundreds of pages of arguments, documents, and motions in support of their strike motions; but they submitted no admissible evidence on the issues decided by the courts.

Appellant then timely moved by noticed written motion under CCP § 425.16(g) to discover critical evidence which was in the sole and exclusive control of

Respondents, and which was essential to help Appellant establish a *prima facie* case in order to defeat the anti-SLAPP motions. (AA1503-1524,1892-1904) It was denied. (AA1921-1922)

The trial court then summarily granted such motions to strike on the ground that Appellant could not possibly show lack of probable cause (AA2688-2690); but without permitting such prior critical discovery, and without a jury trial to determine facts critical to the determination of probable cause.

Appellant's Writ of Mandate was denied on October 25, 2002. Appellant timely appealed. (AA2691-2692) On April 20, 2004, the Court of Appeal affirmed the trial court's order to strike Appellant's complaint, its order denying discovery, and its order awarding Respondents attorney fees and costs. (EXHIBIT A) Appellant's Motion for Rehearing was denied on May 14, 2004. (EXHIBIT B)

Appellant contends that the orders of the trial court, and the affirmation thereof by the Court of Appeal, were error as a matter of law and constituted a miscarriage of justice. Appellant also contends that such orders and affirmations violated Appellant's constitutional rights, *inter alia*, to petition for redress of grievances, to due process of law, to equal protection of the laws, to free speech, and to a trial by jury.

In spite of such orders and affirmations, Appellant also contends that he has shown and substantiated *prima facie* and as a matter of law, a probability of prevailing on his complaint at a jury trial on the merits. Appellant also contends that Respondents have not

provided (as required by law) any admissible evidence which is necessary to defeat Appellant's *prima facie* showing as a matter of law.

Thus, the trial court's orders, and the Court of Appeal's affirmations, must be reversed as a matter of law, and this case should be remanded to the trial court for discovery and a jury trial on the merits.

LEGAL ARGUMENTS

I

THE ANTI-SLAPP STATUTE ON ITS FACE DOES NOT APPLY TO APPELLANT'S MALICIOUS PROSECUTION ACTION.

The purposes for the Legislature's enactment of CCP § 425.16 are stated in its preamble, CCP § 425.16(a), to wit:

> (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

Appellant respectfully contends that the motion to strike remedy, sub-section 425.16(b), must be interpreted subject to the Legislature's stated purposes. The remedy for violation or abuse of such purposes cannot be rationally interpreted and applied as if it existed independently of such limiting purposes, as was done in the case at bar. To do otherwise is a violation of due process of law. (*Gooding v. Wilson* (1972) 405 U.S. 518.)

The preamble clearly excludes the application of

CCP § 425.16 to the case at bar. For example:

1. Appellant's lawsuit was not "brought primarily to chill the valid exercise of [Respondents'] constitutional rights of freedom of speech and petition." It was not a prior restraint. It was brought after Respondents' freely exercised their protected rights, as Appellant's only remedy for Respondents' prior abuse of the judicial system.

2. Appellants' lawsuit does not involve "matters of public significance." It only involves a private dispute between individuals.

3. There is no "continued public participation" in Appellant's private dispute which needs governmental "encouragement" or protection from "increased lawsuits".

4. Appellants' lawful petition for redress of grievances is not an "abuse of the judicial process."

5. The final language of the preamble, "To this end, this section shall be construed broadly," specifically limits such broad interpretation to the furtherance of the purposes (or "end") stated in the preamble, *vis.* "To this end."

Most private legal disputes, such as the case at bar, are not an area of compelling state public interest (*Consolidated Edison v. Public Service* (1980) 447 U.S. 530); curiosity perhaps, but certainly not "continued public participation". Justice Baxter's companion opinion in *Briggs v. Eden, supra,* 19 Cal.4th 1106, 1126-1127, describes the characteristics of anti-SLAPP suits

which CCP § 425.16 was intended to combat. Appellant's malicious prosecution action is completely outside of such descriptions.

CCP § 425.16, as interpreted, applied, and executed, also irrationally violates public policy with respect to malicious prosecution actions, as stated in *Jaffe v. Stone* (1941) 18 Cal.2d 146, 159-160, and reaffirmed in *Herrera v. Beydoun* (2004) 32 Cal.4th 336, 349.

II

APPLICATION OF THE ANTI-SLAPP STATUTE TO APPELLANT'S ACTION IS A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS

The overly broad interpretation of the anti-SLAPP statute's motion to strike (CCP § 425.16(b)) contained in *Briggs v. Eden, supra*, 19 Cal.4th 1106, and *Jarrow v. LaMarche* (2003) 31 Cal.4th 728, irrationally extends the entire statute to almost limitless application by the courts of California. Appellant respectfully contends that such interpretation, application, execution, and state action, violates Appellant's constitutional guarantees.

As a result of the above, CCP § 425.16 is so broad, vague and uncertain as to violate the due process guarantee of the California Constitution, Article 1, section 7, and the due process clause of the Fourteenth Amendment of the United States Constitution (*Logan v. Zimmerman* (1982) 455 U.S. 422), to wit:

> ". . . No State shall make or enforce any law which shall . . . deprive any person of life,

liberty, or property, without due process of law; . . ."

The anti-SLAPP statute as so interpreted has no commonly understood objective standard for its application. (*Rabeck v. New York* (1968) 391 U.S. 462) Persons of ordinary intelligence, like Appellant, must necessarily guess as to its meaning and scope. (*Winters v. New York, supra*, 333 U.S. 507, 515, 518; *Herndon v. Lowry* (1937) 301 U.S. 242.) It is therefore susceptible to sweeping, arbitrary, capricious and other improper applications which would deny any reasonable due process to the person(s) being deprived of their protected rights, such as Appellant. (*Keyishian v. Regents* (1967) 385 U.S. 589.)

To interpret every private legal dispute as involving a public issue of public significance with respect to which the continued participation of the public must be protected by an onerous and punishing special motion to strike, and punitive mandatory awards of attorney fees and costs (CCP § 425.16(c), opens the flood gates for potential arbitrary, irrational and punitive application of CCP § 425.16 to every prospective lawsuit in the state.

The sweeping application of CCP § 425.16 to all malicious prosecution actions (including Appellant's) was only one example of such improper and irrational application. As plainly read and interpreted, CCP § 425.16 could apply to any action (including small claims) arising from any statement or expression in furtherance of such constitutional rights by an individual in any place open to the public in any part of the State, which is made in connection with any issue under

consideration or review by any official proceeding or body (whatever that means) in any other part of the state, no matter how remote the connection, the issue, the consideration, or the body.

CCP § 425.16 could be arbitrarily applied to any breach of contract action where the breach was verbal, written or conduct free speech, to any defamation or slander of title case, to any fraud case where the misrepresentation was alleged free speech, to any verbal assault case, to any verbal claim of title or right-of-way, to any breach of warranty, to any act interpreted as verbal conduct, to any proposed legal action or any protected expression concerning the above . . ; the list is potentially endless.

None of the prospective plaintiffs in any such actions, as was the case with Appellant, would have any objective warning as to whether they would face the burdens and penalties of a motion to strike, and the arbitrary denial of their protected rights, when they contemplated filing their actions. (*Winters v. New York, supra*, 333 U.S. 507)

For similar reasons, Appellant also respectfully contends that such overly broad, vague and uncertain interpretation, application and state action also abridges Appellant's Fourteenth Amendment "liberty" rights of free speech (and the press) and petition for redress of grievances, incorporated from the First Amendment to the United States Constitution, including:

> "Congress shall make no law . . . abridging the freedom of speech, . . or to petition the

Government for a redress of grievances."

It also violates the guarantees of free speech and to petition for redress contained in the California Constitution, Article 1, sections 2 and 3. CCP § 425.16, as so broadly interpreted and applied, stifles such fundamental personal liberties. (*Shelton v. Tucker* (1960) 364 U.S. 479, 488; *Scull v. Virginia* (1959) 359 U.S. 344.)

The broadness, vagueness and uncertainty of the anti-SLAPP statute, as so construed and applied, constitutes an unreasonable abridgement, deterrent, and prior restraint to the protected rights of a potential plaintiff to speak freely and/or to petition for redress of grievances. (*Id.*; *Hoffman Estates v. Flipside* (1982) 455 U.S. 489) Such potential application would have a "chilling effect" on prospective plaintiffs' valid exercise of their constitutional rights to petition for redress, and to freely state their grievances in open court to a jury of their peers and the press. There are no clear and present dangers or other compelling rational basis to justify the above abridgements and prior restraints.

It also arbitrarily abridges by penalizing, punishing and burdening such liberties, protected free speech and petitioning rights. (*Winters v. New York, supra*, 333 U.S. 507; *Broadrick v. Oklahoma* (1973) 413 U.S. 601) CCP § 425.16 is not merely a simple screening device, like a demurrer, which applies to everyone, and can be defensed by merely alleging a *prima facie* cause of action. The special motion to strike with its requirement of early substantiation with admissible evidence, is extremely onerous, time consuming and financially

burdensome. As it is executed, like in Appellant's case, the courts require *de facto* that the plaintiff first prove his case to the court. The only remedy is to appeal to yet another court. The result is a denial of due process and the state guaranteed right to a jury trial. (*Logan v. Zimmerman, supra,* 455 U.S. 422; California Constitution, Article I, section 16)

Then, when the plaintiff loses his expensive and risky task of trying to convince the courts, he is further penalized and punished because all of the costs and attorney fees incurred by the defendants, including during appeals, await plaintiff's payment (CCP § 425.16(c)), even if the defendant lawyers are representing themselves. *Ketchum v. Moses* (2001) 24 Cal.4th 1122.

For example, Appellant has already incurred several hundred thousand dollars in defending against Respondents' motions to strike, and in mandatory payment of Respondents' costs and attorney fees. In effect, Appellant has been required to pay the costs and attorney fees of the very persons who maliciously prosecuted him. The Court of Appeal has now ruled that Appellant must also pay Respondents' attorney fees and costs on appeal. (App. Opinion, p.15) Appellant has also lost well over one thousand hours of time, and has waited over three years for his right to a jury trial, which may never come. The average plaintiff could not financially withstand, nor emotionally face, such onerous burdens and penalties. When necessary discovery is denied, as in Appellant's case, the burden becomes almost impossible.

In addition, the burdens and penalties of CCP § 425.16 are arbitrarily and irrationally applied only to certain plaintiffs similarly situated (Appellant) and not to others (Lawler). Lawler and the other Respondents were allowed to freely exercise their personal liberties, rights of free speech and to petition for redress in the underlying case. They had their constitutionally protected day in court without prior restraint, but are now attempting to deny Appellant from having his.

Appellant's constitutionally protected rights of due process of law, free speech, petitioning for redress, normal discovery (and in California, a jury trial), have not been equally protected by such state action, enactment, interpretation, application and enforcement. This arbitrary discrimination, arbitrary classification and intentionally unequal treatment, is a violation of the California Constitution, Article 1, section 7, and also a violation of the 14th Amendment to the Constitution of the United States, to wit:

> ". . . No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

As the United States Supreme Court stated in *Willowbrook v. Olech, supra*, 528 U.S. 562:

> "Equal Protection claims [may be] brought by a 'class of one;' where the plaintiff alleges that [he] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."

> "'the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'"
> (*Id.*, p. 564)

In addition to the above, it has become obvious to Appellant, *inter alia*, by reason of various communications and conduct, that such unequal protection and arbitrary discrimination in Appellant's case had the effect of assisting and protecting the prominent and influential local Respondent attorneys, with respect to embarrassing discovery, tort allegations, damages, attorney fees, the possibility of criminal charges, and Appellant's prosecution of his legitimate claims.

A further example of CCP § 425.16's arbitrary discrimination, and unequal treatment, is the enforcement of its attorney's fees and costs provision, CCP § 425.16(c), where successful Respondents' have recovered their costs and attorney fees as a matter of right, but if Appellant were successful he cannot recover costs and attorney's fees unless, "the court finds that [Respondents'] special motion to strike is frivolous or is solely intended to cause unnecessary delay. . ;" an almost impossible standard to achieve. There is no justifiable rational basis for this different treatment of Appellant.

III

AS A MATTER OF LAW, APPELLANT HAS *PRIMA FACIE* ALLEGED AND SUBSTANTIATED WITH ADMISSIBLE EVIDENCE EVERYTHING THAT IS REQUIRED BY LAW

As a matter of law, Appellant has *prima facie* alleged and substantiated with admissible evidence, and legitimate inferences based thereon:

a) All elements of his malicious prosecution action, and that Appellant has a probability of prevailing at trial on his malicious prosecution action; (AA0002-0041,1973-1979,1981-1983, Appellant's Briefs/Appendix)

b) That the interim-adverse-rulings, *vis.* the denial of summary judgment, the jury verdict, and the reversed judgment, in the underlying case, were all obtained by fraud or perjury, and do not create a presumption of probable cause in Appellant's malicious prosecution action; (*Id.*)

c) That Appellant had a right to reasonable discovery and a jury trial before the motion to strike his complaint was ruled on;

d) That Respondents have impliedly waived their attorney-client privileges with respect to Appellant's malicious prosecution action. (*Id.*)

The courts failed to consider the vast amount of admissible evidence and legitimate inferences based thereon which Appellant submitted in order to establish

a *prima facie* case. (*Id.*) The Respondents offered no admissible evidence to challenge Appellant's evidence on any of the issues ruled on by the courts. Therefore Appellant has *prima facie* substantiated his allegations as a matter of law, and Respondents' motions to strike Appellant's complaint should have been denied as a matter of law. *Wilcox v. Superior Court, supra*, 27 Cal.App.4th 809, 827-828; *Briggs v. Eden Council, supra*, 19 Cal.4th 1106, 1123.

Appellant's burden under CCP § 425.16 was not to prove his claims to the trial court. It was only to state and substantiate a legally sufficient claim.
The Supreme Court in the *Briggs* case, stated:

> "This court and the Courts of Appeal, noting the potential deprivation of jury trial that might result were [section 425.16 and similar] statutes construed to require the plaintiff first to prove the specified claim to the trial court, have instead read the statutes as requiring the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim."
> *(Briggs v. Eden Council, supra*, 19 Cal.4th1106, 1123; emphasis added)

As the Court in *Wilcox v. Superior Court, supra*, 27 Cal.App.4th 809, 827-828, stated:

> ". . . the requirement of establishing a substantial or reasonable probability of success means only that the plaintiff must demonstrate the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to

> sustain a favorable judgment if the evidence submitted by the plaintiff is credited. If either of these requirements is not met, the motion to strike must be granted; if both are satisfied, it must be denied."
>
> "Only when no evidence of sufficient substantiality exists to support a judgment for the plaintiff may the defendant's motion be granted." (emphasis added)

By granting Respondents' motions to strike Appellant's complaint, the courts have not only violated Appellant's right to due process of law, but they have also deprived him of his right to a jury trial under the California Constitution, Article I, § 16, as well.

Appellant also timely petitioned for, and established as a matter of law that he was entitled to, necessary and limited discovery. (AA1503-1524,1892-1904) By denying normal and necessary discovery before ruling on Respondents' motions to strike, the courts have again violated Appellant's right to due process of law.

> "In order to satisfy due process, the burden placed on the plaintiff must be compatible with the early stage at which the motion is brought and heard (§ 425.16, subs. (f) and (g)) and the limited opportunity to conduct discovery (subd. (g))."
> (*Wilcox v. Superior Court, supra*, 27 Cal.App.4th 809, 827; emphasis added)
>
> "If the plaintiff makes a timely and proper

showing in response to the motion to strike, that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case, the plaintiff must be given the reasonable opportunity to obtain that evidence through discovery before the motion to strike is adjudicated. . .

"The trial court, therefore, must liberally exercise its discretion by authorizing reasonable and specified discovery timely petitioned for by a plaintiff . . . when evidence to establish a prima facie case is reasonably shown to be held, or known, by defendant or its agents and employees. . . (§ 425.16, subd. (g)
. . . So construed, the statute does not violate a plaintiff's right to due process of law . . .
(*Lafayette Morehouse v. Chronicle* (1995) 37 Cal.App.4th 855,868; emphasis added)

Even if the Respondent attorneys did not know about the lack of probable cause when they filed Lawler's complaints, as a matter of law they are liable if they continued to maliciously prosecute Lawler's actions after they learned of such lack of probable cause. (*Zamos v. Stroud, supra*, 32 Cal.4th 958) Only reasonable discovery could determine what the Respondents knew, and when they knew it.

IV

THE FRAUD-PERJURY EXCEPTION TO THE INTERIM-ADVERSE-JUDGMENT PRESUMPTION OF PROBABLE CAUSE, APPLIES TO APPELLANT'S ACTION

Appellant alleged, substantiated with admissible evidence, and argued that the fraud-perjury exception to the interim-adverse-judgment presumption of probable cause, as described in *Wilson v. Parker, supra*, *Roberts v. Sentry, supra*, and *Zamos v. Stroud, supra*, applies in his malicious prosecution action. Specifically, Appellant argued that the denial of Appellant's summary judgment motion, the trial court's order in limine, the jury's fraud verdict, and the trial judge's judgments and denials of post judgment motions, had been induced by materially false facts submitted, and perjured testimony given and subornated, by the Respondents.

However, the Court of Appeal held that Appellant could not raise such issue of Respondents' fraud and perjury, or offer evidence thereof for purposes of establishing such fraud-perjury exception or of rebutting such presumption of probable cause, because such issues had repeatedly been argued and litigated against Appellant in Respondents' underlying fraud actions. In other words, that Appellant could not "collaterally attack evidentiary rulings in another case", or "relitigate adversely decided factual matters for purposes of the exception" in Appellant's malicious prosecution case. (App. Opinion, p.10).

The Court of Appeal acknowledged that the Appeals Court in the underlying case had never ruled on the

issue of Lawler's perjuries, that Lawler's fraud judgment had been reversed on its merits, and that Appellant argued that collateral estoppel does not bar raising such issue again in the current action. Nevertheless, the Court of Appeal then decided that collateral estoppel was not the issue, and instead created a new *ad hoc* doctrine that would, in any event, prohibit Appellant from relitigating adversely decided factual matters in another case, for purposes of the exception to the interim-adverse-judgment rule. (App. Opinion, p.10)[7] The Court stated:

> "Inherent in this rationale is that a malicious-prosecution plaintiff cannot set up allegations of fraud and perjury for purposes of the exception to the interim-adverse-judgment rule when the allegations are the same ones that were fairly presented and rejected in the underlying action."
> (App.Opinion, p.12, citing *Cowles v. Carter* (1981) 115 Cal.App.3d 350.)

However, the Court of Appeal erred, as a matter of law.

The doctrine of collateral estoppel prohibits Appellant from "relitigating an issue only if . . . there was a final judgment on the merits" in the prior case. *Clemmer v. Hartford Insurance, supra*, 22 Cal.3d 865, 874 (emphasis added); *Bernhard v. Bank of America,*

[7] The Court of Appeal also implied that Appellant's submitted evidence was not competent for this purpose.

supra, 19 Cal.2d 807, 813. Appellant's appellate briefs also cited *Grain Dealers v. Marino, supra*, 200 Cal.App.3d 1083, 1088, to the same effect.

In the underlying case, the Court of Appeal unconditionally reversed Lawler's fraud judgment on its merits as a matter of law based on CCP § 580b, and without ruling on any issue of Lawler's perjuries. *Lawler v. Jacobs, supra*, 83 Cal.App.4th 723, 738. Therefore, there was no final judgment on the merits of Lawler's fraud actions in the prior case, and the issue of Lawler's perjuries only related to his fraud actions.

Appellant also pointed out to the courts that the question of Respondents' frauds, perjuries, and subornations of perjury were never even litigated in the underlying case, because:

a. Appellant did not even know of Lawler's perjuries until well after Appellant's summary judgment motion, and such perjuries were not an issue in such summary judgment proceedings; (AA0149-0171)

b. Neither the trial court nor the jury in Lawler's underlying fraud actions, ever considered or ruled on issues of Lawler's perjuries, because the trial court had ruled, based on Lawler's attorney-client privilege, that McCracken's evidence of Lawler's perjuries was inadmissible at trial; (AA0455,0458-0459,0445,0452-0455)

c. The Court of Appeal in Lawler's underlying fraud actions never ruled on Lawler's perjuries,

because they reversed Lawler's fraud judgment on other grounds (*vis.* CCP § 580b); (*Lawler v.Jacobs, supra*, 83Cal.App.4th at726,736-738) and

d. The issues of the Respondent attorneys' frauds and subornations were never at issue in Lawler's underlying fraud actions, because Lawler was the sole plaintiff and such attorneys were not parties; they were his only legal counsel in such actions. (AA0110-0136,0303-0317)

The case of *Cowles v. Carter, supra*, 115 Cal.App.3d 350, is distinguished because the *Cowles* court acknowledged the existence of the fraud-perjury exception to the interim-adverse-judgment rule numerous times, but did not apply it because the plaintiff in *Cowles* had "not suggested that any fraud was involved in the jury verdict."[8] (Id., p.354) The Court of Appeal neglected to mention these facts in its opinion.

The Supreme Court in *Wilson v. Parker, supra*, 28 Cal.4th 811, stated: "The determination of probable cause does not operate, like collateral estoppel, to preclude relitigation of an issue of fact." (*Id.*, p.825) Therefore, neither should 'the determination of the fraud-perjury exception to the presumption of probable cause' preclude such relitigation.

However, the trial court and the Court of Appeal

[8] The same is true of the other cases cited in *Cowles*. If there had been fraud it would have negated "a fairly presented adversary hearing."

ignored all of the above facts and law, and instead struck Appellant's complaint pursuant to the anti-SLAPP statute.

Appellant also argued that no interim-adverse-judgment in Lawler's underlying fraud actions could have created any presumption of probable cause for fraud. (AOB35-38) When the Court of Appeal in *Lawler v. Jacobs, supra*, 83 Cal.App.4th 723, reversed Lawler's judgment on his fraud actions, it held that Appellant's contractual "waiver of anti-deficiency protection was void as contrary to statute [CCP § 580b] and public policy."

> "These agreements are unenforceable and cannot serve as the basis for Lawler's action for breach of contract and fraud. . ." (*Id.*, pp. 736; emphasis added)

Thus Lawler's fraud actions were always void, unenforceable, invalid, and without probable cause, as a matter of law; and as such, there could be no evidence to support them. No reasonable attorney (judge or jury) could ever have believed that any interim-adverse-judgment based on such void and unenforceable actions (which could never be supported by evidence), was valid or could create a presumption of probable cause. (*See Wilson v. Parker, supra*, 28 Cal.4th at 822; *Sheldon v. Albert, supra*, 47 Cal.3d 863)

V

THE *MITCHELL* DOCTRINE OF RESPONDENT'S IMPLIED WAIVER OF ATTORNEY-CLIENT PRIVILEGE,

APPLIES TO APPELLANT'S ACTION

Appellant alleged, substantiated with admissible evidence, and argued that Respondent Lawler impliedly waived his attorney-client privilege in his underlying actions for fraud, where an element of such fraud actions (Respondent Lawler's reasonable reliance) necessarily placed directly in issue any communication between Lawler and his attorney McCracken on the subject of Lawler's reliance, which communication was critical to Appellant's defense. (AOB55-60) *Mitchell v. Superior Court, supra*, 37 Cal.3d 591, 604; *Southern California Gas v. P.U.C.* (1990) 50 Cal.3d 31, 41, which cites *Hearn v. Rhay* (1975) 68 F.R.D. 574, 581.

Appellant also argued that such prior implied waiver necessarily applies to the current malicious prosecution action, where Appellant has alleged that Respondents' underlying fraud actions were maliciously prosecuted, and that such attorney-client communication was critical to conclusively prove Lawler's perjuries and his maliciously prosecuted fraud actions. The Court of Appeal ruled to the contrary based on a new *ad hoc* rule of law. (App. Opinion, p.12) This was prejudicial error, as a matter of law.

Appellant also argued that the Respondents had raised the issue of Lawler's prior waiver of his attorney-client privilege in Appellant's current malicious prosecution action, by asserting in support of their motions to strike that Lawler had never waived his attorney-client privilege in the underlying case. (ARB34-35) This assertion by Respondents placed Lawler's prior implied waiver of his attorney-client

privilege directly in issue in the malicious prosecution case. The Court of Appeal declined to rule on this issue, and instead concluded that Respondents "placed no privileged communications in issue . . . [because] Jacobs sued them" for malicious prosecution. (App. Opinion, p.12)

The Court of Appeal also ruled that Appellant was collaterally estopped from again raising the issue of Respondent Lawler's implied waiver of his attorney-client privilege in the malicious prosecution case, because this issue had been litigated and ruled against Appellant in the underlying case. (App. Opinion, pp.14-15) But the Court of Appeal erred as a matter of law.

The doctrine of collateral estoppel prohibits Appellant from "relitigating an issue only if . . . there was a final judgment on the merits" in the prior case. *Clemmer v. Hartford Insurance, supra*, 22 Cal.3d 865, 874 (emphasis added); *Bernhard v. Bank of America, supra*, 19 Cal.2d 807, 813; *Grain Dealers v. Marino, supra*, 200 Cal.App.3d 1083, 1088. In the underlying case, the Court of Appeal unconditionally reversed Lawler's fraud judgment on its merits as a matter of law based on CCP § 580b, and without ruling on the issue of Lawler's waiver of his attorney-client privilege. *Lawler v.Jacobs,supra*, 83Cal.App.4th 723,738. Therefore, there was no final judgment on the merits of Lawler's waivers of his attorney-client privilege in the prior case, and such waivers only related to his fraud actions.

Nor was any issue of Lawler's waiver of his attorney-client privilege ever finally litigated against Appellant in the underlying case. The only interim ruling by the trial

court in the underlying case which dealt with Lawler's waiver of his attorney-client privilege, was based on the doctrine of 'substantial disclosure' of a privileged communication. The trial court only narrowly ruled that Lawler's deposition testimony was not a 'substantial disclosure' because it was foundational. (AA0458-0459,0455-0456)

The very different *Mitchell* Doctrine of implied waiver based on voluntarily placing in issue a privileged communication which is vital to Appellant's case, was repeatedly asserted by Appellant in Respondents' underlying actions. (AA0343-0361,0417-0428,0435-0441) However, this issue was never ruled on by the trial court. Also, the Court of Appeal in the underlying case never ruled on such issue, because it reversed Lawler's fraud judgment on other grounds. Thus, the issue of Lawler's implied waiver of his attorney-client privilege based on the *Mitchell* doctrine was never even litigated in Lawler's underlying actions.

CONCLUSION

For the reasons set forth above, petitioner Justin M. Jacobs, Jr., respectfully requests that the Supreme Court grant review in this case.

DATED: June 1, 2004 Respectfully submitted,

"s/*Justin M. Jacobs*/"
Justin M. Jacobs, Jr.
In Propria Persona